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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA,

5 v.

18 Cr. 289 (SHS)

6 BRYAN DUNCAN, RYAN RAINFORD,
7 ROBERT LOCUST,

8 Defendants.

Trial

9 -----x

10 New York, N.Y.
11 May 22, 2019
12 10:32 a.m.

13 Before:

14 HON. SIDNEY H. STEIN,

15 District Judge,
16 -and a Jury-

17 APPEARANCES

18 GEOFFREY S. BERMAN

19 United States Attorney for the
20 Southern District of New York

21 BY: NICHOLAS W. CHIUCHIOLO

22 ALEXANDRA N. ROTHMAN

23 NICHOLAS FOLLY

24 Assistant United States Attorneys

25 AL-SHABAZZ LAW GROUP, PC

Attorneys for Defendant Bryan Duncan

BY: IKIESHA TAQUET AL-SHABAZZ, ESQ.

THE C.H. SCHOLAR LAW FIRM

Attorneys for Defendant Ryan Rainford

BY: CALVIN H. SCHOLAR, ESQ.

MITCHELL J. DINNERSTEIN, ESQ.

ANTHONY CECUTTI, ESQ.

Attorneys for Defendant Robert Locust

ALSO PRESENT: CAROLINE LEFEVER, Paralegal Specialist, USAO
RICHARD PRINCE, Special Agent, FBI

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Rebuttal - Mr. Folly

1 (In open court; jury not present)

2 THE COURT: All right. Everyone is here. I don't
3 know whether you know or not, but a juror was quite late. He
4 phoned in. Apparently he states that his daughter was sick and
5 he had to find childcare. The jury is here now. Let's bring
6 them in.

7 MR. FOLLY: Your Honor, we'd just request that
8 Ms. Al-Shabazz put away her face board. We're not using it
9 during our rebuttal.

10 MS. AL-SHABAZZ: Yes, your Honor. It's just laying
11 there. Their face board has been up the entire trial. And
12 again, they're asking for a request --

13 MR. FOLLY: We just ask that it be turned around.

14 THE COURT: There's no need to be showing it to the
15 jury. Turn it around.

16 Jury entering.

17 (Jury present)

18 THE COURT: Please be seated in the courtroom.

19 Ladies and gentlemen, I'm glad all 16 of you are
20 finally here. I understand someone had an issue with
21 childcare. Those things do happen.

22 We now are going to hear the rebuttal summation of the
23 government by Mr. Folly.

24 Mr. Folly.

25 MR. FOLLY: Ladies and gentlemen, you heard hours and

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Rebuttal - Mr. Folly

1 hours of arguments yesterday by all of the defense attorneys
2 here about this case. You heard arguments about ride or die;
3 you heard arguments about crocodile tears; you heard arguments
4 about handshakes; you heard comments about Liberia; you heard
5 discussions about magnets and needles and haystacks. I'm not
6 going to talk about any of that, because none of that has
7 anything to do with what's relevant in this case. It's a total
8 sideshow. It's a distraction from the only thing that matters
9 here -- the evidence. That's the only thing that matters in
10 this case. The overwhelming evidence that you have heard over
11 the last two weeks is that each of these defendants, Bryan
12 Duncan, Ryan Rainford, and Robert Locust, knew exactly what was
13 going on here. They knew that this was a fraud scheme.

14 MR. DINNERSTEIN: Objection, your Honor. That's not
15 the standard.

16 THE COURT: I'll allow that statement.

17 MR. FOLLY: Do not fall for that distraction, ladies
18 and gentlemen.

19 Now I'm not going to have time to go back through all
20 the arguments that you heard yesterday. I'm not going to
21 respond to all of them. But I don't need to. The evidence in
22 this case speaks louder than anything I can say. It speaks
23 louder than anything these defense attorneys can say. You've
24 heard and seen all of that evidence at this point.

25 So I'm just going to focus on the main arguments here

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Rebuttal - Mr. Folly

1 today. Before I do that, I want to make one thing very clear.
2 You've heard this already. You'll hear this again. The
3 defendants, they have no burden whatsoever in this case. The
4 burden is on the government, and we embrace that burden, and
5 we've met that burden. But when the defense attorneys get up
6 here and they make arguments to you, we are entitled to
7 respond, and you are entitled to think about those arguments
8 carefully, to ask yourselves, do they make any sense; are they
9 consistent with the evidence that you've seen in this case.
10 You are entitled to ask yourself that. And when you do, you
11 will see that they're a total distraction. They're not
12 consistent whatsoever with the evidence in this case, the one
13 thing that matters.

14 Before we jump into things, I want to clear up a few
15 things from yesterday, because Ms. Al-Shabazz got up here
16 yesterday and she said some things to you that were deeply
17 misleading, some things that completely contradict the actual
18 evidence in this case. So let's start there. Let's clear that
19 up.

20 When Ms. Al-Shabazz got up here, she started talking
21 about Jasmond Cunningham. She says, "I'm going to get rid of
22 Jasmond Cunningham." Those were her words. And you know why
23 she tried to get rid of Jasmond Cunningham. Because his
24 testimony against her client, Bryan Duncan, is absolutely
25 devastating. It's crushing. Cunningham takes us back to 2015,

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Rebuttal - Mr. Folly

1 after Bryan Duncan had supposedly left Peter Kalkanis, he had
2 supposedly found out this was a big fraud scheme, cleaned up
3 his act. That's what he had supposedly done. That's what
4 Ms. Al-Shabazz said. And we'll come back to that, ladies and
5 gentlemen.

6 MS. AL-SHABAZZ: Objection. That's not what I said.

7 THE COURT: Ladies and gentlemen, remember, what the
8 lawyers say is not evidence. I want you to listen to what they
9 have to say, but what the lawyers say is not evidence, and
10 whatever Ms. Al-Shabazz said or didn't say, she said or didn't
11 say.

12 Proceed.

13 MR. FOLLY: But Cunningham, Cunningham, ladies and
14 gentlemen, that's the individual that Duncan recruited from the
15 homeless shelter in 2015, when he had supposedly turned a new
16 leaf, put everything from Kalkanis behind him. In 2015,
17 Cunningham is the guy that Bryan Duncan recruits from the
18 homeless shelter. So this completely blows up this pretty
19 little narrative that Bryan Duncan left everything behind with
20 Kalkanis, started over, was doing things by the book;
21 completely blows that up, so of course Ms. Al-Shabazz got up
22 here and she tried to get rid of Cunningham.

23 So she tried to make a big deal about the fact that
24 Bryan Duncan took this trip. He left on June 25th, came back
25 on July 2nd from Liberia. Remember that? Ms. Al-Shabazz

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Rebuttal - Mr. Folly

1 called a witness at this trial just to show you that Bryan
2 Duncan went to Liberia for a week, right? Remember that? And
3 guess what? When I asked that witness on cross-examination the
4 only relevant question, the only question that matters or is
5 relevant to you, "When you returned from that trip, do you know
6 if Bryan Duncan met with Jasmond Cunningham?"

7 MS. AL-SHABAZZ: Objection. That was sustained,
8 Judge.

9 MR. FOLLY: Your Honor, that was not sustained.

10 THE COURT: Just a moment.

11 MR. FOLLY: Your Honor, it's on page 1577, and it was
12 overruled and the testimony was allowed.

13 THE COURT: I did allow that. I did allow that
14 question to be answered.

15 Proceed.

16 MR. FOLLY: So you know what he said in response? He
17 said he didn't know anything about that, he moved to France.
18 That was his response. The only relevant question to that
19 witness, and that was his response. It's a total distraction
20 from what matters here. Yet yesterday, Ms. Al-Shabazz got up
21 here and she tried to suggest to you that Jasmond Cunningham
22 was lying about what happened here.

23 First, ladies and gentlemen, start with Jasmond
24 Cunningham's actual testimony at this trial. Again,
25 Ms. Al-Shabazz didn't show you his testimony. That's what

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Rebuttal - Mr. Folly

1 matters here.

2 MS. AL-SHABAZZ: Objection. I have no burden to show
3 the jury anything.

4 THE COURT: Well, the jury understands the burden is
5 always on the government.

6 Go ahead.

7 MR. FOLLY: Here's what he says about when he saw
8 Duncan after Duncan got him to stage the accident:

9 "I'm not sure if it was a week or two weeks after, but
10 I know I seen him shortly after I came from the emergency
11 room."

12 MS. AL-SHABAZZ: Objection.

13 MR. FOLLY: That's it.

14 THE COURT: Ms. Al-Shabazz, this jury will decide what
15 the evidence was.

16 MR. FOLLY: That's it. That's the testimony on this,
17 ladies and gentlemen. It's right there in the transcript.

18 MS. AL-SHABAZZ: That's a mischaracterization of the
19 record.

20 THE COURT: That wasn't true on the last objection you
21 raised.

22 Ladies and gentlemen, again, disregard all of this
23 colloquy and all of this frou-frou. You decide what the
24 evidence shows.

25 Go ahead.

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Rebuttal - Mr. Folly

1 MR. FOLLY: Ladies and gentlemen, when does Duncan get
2 back from Liberia? July 2nd, one week after Jasmond Cunningham
3 staged the accident, so that's completely consistent with
4 exactly what Jasmond Cunningham told you. One to two weeks
5 after the accident. Completely consistent.

6 So what did Ms. Al-Shabazz tell you next? It turns
7 out this whole Liberia thing is a total distraction from what
8 actually happened and what matters. This is where things got
9 completely misleading yesterday. She said, look at the toll
10 records in Government Exhibit 701. And I'm glad that she said
11 that, because we should look at them again. She totally misled
12 and misstated the record.

13 THE COURT: Mr. Folly, just focus on what the evidence
14 says. Go ahead.

15 MR. FOLLY: The argument was, there's no messages with
16 Duncan and Cunningham until years after the fact. Years after
17 the fact. Years after 2015.

18 MS. AL-SHABAZZ: Objection.

19 MR. FOLLY: Nothing could be further from the truth.
20 Look at this chart. Who does Duncan call? The first entry on
21 the chart, outgoing call, July 6, 2015. Four days, four days
22 after Bryan Duncan got back from Liberia, who did he call?
23 It's right there on the chart. It's the first entry. It's
24 Jasmond Cunningham. Black and white. That's not years after
25 the fact, ladies and gentlemen; it's four days after Bryan

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Rebuttal - Mr. Folly

1 Duncan gets back from Liberia. Who does he make it a priority
2 to call? He makes it a priority to call Jasmond Cunningham,
3 because that is his recruit. That's who he brought into this
4 scheme. So that's high on his priority list, four days after
5 he gets back from Liberia. That is not years after the fact,
6 ladies and gentlemen; it's four days. So don't get distracted
7 by these arguments. Look at the actual evidence. That's what
8 matters here.

9 Just one other point I want to make about phones and
10 evidence. There was a suggestion yesterday that the government
11 fabricated evidence in this case, ladies and gentlemen. There
12 has been not a shred of evidence at this trial supporting that
13 suggestion. It's a total distraction. When that exhibit came
14 up on the screen, the exhibit with Clarence Tucker's name and
15 phone number, then it said Rob next to it, because that is who
16 recruited Clarence Tucker. And you heard that from Peter
17 Kalkanis. You saw the intake sheet that said Rob with Clarence
18 Tucker. And you know what else? You heard about the
19 extraction report from that same phone, ladies and gentlemen.
20 If Ms. Al-Shabazz wanted to introduce something off of that
21 extraction report --

22 MS. AL-SHABAZZ: Objection.

23 THE COURT: Yes. Don't focus on the intentions of the
24 adversary lawyer. Focus on what the evidence shows.

25 MR. FOLLY: Ladies and gentlemen, that's exactly

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Rebuttal - Mr. Folly

1 right. Focus on the evidence. And there is no evidence
2 whatsoever that that contact entry was fabricated here.

3 So let's go back for a moment to the beginning of the
4 trial. And Ms. Al-Shabazz got up here, she said in the
5 beginning of this trial, Duncan was just a driver, and then
6 when he found out that Peter Kalkanis was using these people to
7 make money off of fraudulent cases, when he found that out, he
8 confronted Peter Kalkanis. That was the story. And he left.

9 MS. AL-SHABAZZ: Objection.

10 THE COURT: I'll allow it.

11 MR. FOLLY: The only problem with that story --

12 THE COURT: What the other side was saying is up to
13 you, the jury, but remember, the arguments of the lawyers are
14 not evidence.

15 Go ahead.

16 MR. FOLLY: Ladies and gentlemen, the only problem
17 with that story is that it's completely contradicted by all the
18 evidence in this case. That's what I'm going to continue to
19 focus on here.

20 Let's go back to the beginning of this. Duncan, he
21 was running cases all the way back in 2012, long before he
22 separated from Peter Kalkanis. 2012.

23 And I want to pause on that point for a second and
24 just clear something up. Judge Stein is going to instruct you
25 on the law very soon. And you should listen carefully to those

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Rebuttal - Mr. Folly

1 instructions and follow them. But I expect he's going to tell
2 you something very important about the law of conspiracies.
3 First, it doesn't matter how long any particular defendant was
4 a member of a conspiracy. Ms. Al-Shabazz said to you yesterday
5 that if Duncan left the conspiracy in 2015, how could he be in
6 that conspiracy from 2015 through 2018. That's a total
7 distraction here, because he was in the conspiracy from 2013
8 until 2015. That's enough. Don't get distracted by the fact
9 that he may have left the conspiracy in 2015.

10 So that brings us back to this other argument that
11 Ms. Al-Shabazz raised to you yesterday, that there's no
12 evidence that Bryan Duncan was involved in this conspiracy
13 between 2013 and 2015. Think about all the testimony you heard
14 and saw at this trial. Alvin Martin, Reginald Dewitt, Tina
15 Nichols, Carol White, Brendon Connaught, they were all
16 recruited by Duncan into this scheme.

17 MS. AL-SHABAZZ: Objection. Objection.

18 THE COURT: Just a moment.

19 What Mr. Folly is saying, he believes the evidence
20 will show that all of those people were recruited by Duncan
21 into the scheme.

22 Proceed.

23 MR. FOLLY: You heard, ladies and gentlemen, from four
24 of those witnesses at this trial. Four witnesses who told you
25 they were recruited by Duncan before 2015 into this scheme.

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Rebuttal - Mr. Folly

1 Just the testimony of one of those witnesses would
2 tell you all you need to know here. Duncan was a member of
3 this conspiracy way before 2015. But when you put all of that
4 testimony together, the picture is clear. It's overwhelming.
5 Duncan was a member of this scheme from the very beginning.

6 Now one thing Ms. Al-Shabazz said yesterday, which
7 actually made a lot of sense, was that when you talk about
8 knowledge, she said, you know what someone knows based on their
9 actions, based on what they do, and that's exactly right. So
10 we have to focus on the actions of Bryan Duncan, the actions
11 going all the way back to the beginning of this conspiracy.

12 First, let's look at Alvin Martin. Ms. Al-Shabazz
13 spent a lot of time yesterday talking about Alvin Martin. And
14 you know exactly why she did that. Once again, his testimony
15 is devastating against her client. He's a childhood friend of
16 Bryan Duncan's. He did not want to come into this courtroom
17 and have to testify about what Bryan Duncan had done here, the
18 fact that he had recruited him into this scheme. He didn't
19 want to have to do that, but he did. Remember, he's the one
20 who injured his ankle playing basketball in 2012, and he tells
21 Duncan. And what does Duncan tell him to do? He says, go to
22 the hospital, tell them that you fell and that you injured your
23 back -- in other words, lie; that's what he told him to do
24 here, so that he could get him a bogus lawsuit, and at the end
25 of that bogus lawsuit, Bryan Duncan, he gets his \$5,000 cut.

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Rebuttal - Mr. Folly

1 That's what happens.

2 And he told Alvin Martin to lie again, which we're
3 going to talk about in a few minutes. But before that happens,
4 he also brought along Alvin Martin's mother, Carol White, to do
5 her own fraudulent case. Ladies and gentlemen, I know that you
6 remember Ms. White. She came in here, she described to you
7 what happened. She told you how she nearly died when she got
8 one of her surgeries. You cannot forget that, ladies and
9 gentlemen. That's not something Ms. White would have
10 forgotten, the circumstances of that happening. That's an
11 event in your life you simply don't forget.

12 So Ms. Al-Shabazz, she came up here and she focused.
13 She said you can't believe either one of them --

14 MS. AL-SHABAZZ: Objection.

15 MR. FOLLY: -- because --

16 THE COURT: Just a moment.

17 Just make your argument based on the evidence or lack
18 of evidence, not ascribing statements to the other side. Move
19 on.

20 MR. FOLLY: There was an argument that you can't
21 believe these witnesses, ladies and gentlemen, Alvin Martin and
22 Carol White, because there's a slight difference in their
23 memory. Carol White remembers that on the day that this all
24 started, when Bryan Duncan got her hooked up with this
25 fraudulent case, she remembers that Duncan was in the house on

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Rebuttal - Mr. Folly

1 that day. Alvin Martin, his memory is that Duncan was not in
2 the house and that he made the call to him when Ms. White got
3 home. That's it. That's the difference in their memories.
4 And ladies and gentlemen, this happened seven years ago. If
5 their stories were identical, that would be something to worry
6 about. But the fact that there's a slight difference in their
7 memories shows you they're telling you the truth. They didn't
8 coordinate their stories. They're just telling you what they
9 remember. And the one thing that they both remembered clearly
10 is that it was Bryan Duncan that set them up with their
11 fraudulent cases. They remember that. Of course they remember
12 that.

13 So let's fast forward about a week before this trial.
14 Bryan Duncan got the witness list, and there was this childhood
15 friend, Alvin Martin, and his mother. That's a big, big
16 problem for Bryan Duncan. So what did he do? He completely
17 panicked, ladies and gentlemen. Because he knows if they come
18 in here and they tell you the truth, he's going to get
19 convicted. He practically used those exact words in the text
20 message exchange with Alvin Martin. So for a period of 12
21 hours overnight -- think about this, it's the middle of the
22 night. And you saw those messages. He's relentless. He will
23 not stop trying to convince his childhood friend, Alvin Martin,
24 to come in this courtroom and lie to you. And not only that,
25 he wants Carol White to lie to you. He wants his childhood

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Rebuttal - Mr. Folly

1 friend and he wants his childhood friend's mother to come in
2 here and also lie to you. So he spends 12 hours overnight
3 frantically trying to convince Alvin Martin to do just that.

4 So ladies and gentlemen, there was this argument
5 yesterday that these messages are actually Bryan Duncan trying
6 to get his friend to tell you the truth. That's what the
7 argument was yesterday. You saw those messages -- the messages
8 where Duncan says to Alvin Martin, "Take care of that." "Take
9 care of that." Get your mom to stop telling the authorities
10 the truth of what happened here. Take care of that. The
11 messages where Duncan says, "I was under the impression that
12 testifying wasn't an option." The messages where Duncan says,
13 "Let me school you." "Let me school you." If you say any of
14 your case is fake and they ask if I set that up, don't say my
15 name. And then, ladies and gentlemen, I know that you have not
16 forgotten that other message, where he says, No one can see our
17 messages or else I'm fucked. I know you have not forgotten
18 that message, ladies and gentlemen. He says, Please, I need
19 you. I need you to go in there and lie for me. I need you to
20 convince your mother --

21 MS. AL-SHABAZZ: Objection.

22 MR. FOLLY: -- to lie for me.

23 MS. AL-SHABAZZ: Objection.

24 THE COURT: This is not what's in the WhatsApp
25 message. This is this lawyer's belief as to what was the

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Rebuttal - Mr. Folly

1 intent of the messages.

2 MR. FOLLY: These are the messages, ladies and
3 gentlemen, that defense counsel wants you to believe are an
4 attempt to get Alvin Martin and his mother to tell the truth,
5 to tell a story that is totally different than the one you
6 heard in this courtroom. And ladies and gentlemen, that is
7 absolutely ridiculous. You saw those messages, you know that
8 is not what was going on in those messages.

9 There's one final point I want to make about Bryan
10 Duncan. I want to address this story that in 2015, he found
11 out that this was all a fraud, he confronted Kalkanis, he was
12 upset because they were using people, and then he cleaned up
13 shop. You've heard that story several times during this trial.
14 So first, we've already been over the fact that he was involved
15 in this fraud scheme going all the way back to 2012. So that
16 story about him just finding out about this in 2015 completely
17 doesn't line up with the evidence. He recruited at least five
18 patients before 2015. You heard testimony from four of them at
19 this trial.

20 But focus on what he did in 2015. He started D&G,
21 Duncan and Gordon. His partner in the new business was Kerry
22 Gordon. That was the runner that you heard about throughout
23 this trial who had set up a hundred staged accidents through
24 Peter Kalkanis. That was his business partner in the new,
25 cleaned up 2015 operation.

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Rebuttal - Mr. Folly

1 The other point here is, who was he working with?
2 George Constantine, the lawyer who was in on this, ladies and
3 gentlemen; Jason Krantz from Fast Trak, the funder who was in
4 on this; Adrian Alexander, another funder who was in on this;
5 Sady Ribeiro, the doctor who was in on this, the doctor that
6 was emailing him: Delete the emails. That's the guy that
7 Bryan Duncan continued to work with in 2015, when he starts the
8 new, cleaned up version of all of this.

9 And guess who he's also still getting patients with?
10 It's not just Kerry Gordon. Reginald Dewitt, the runner that
11 all the defense attorneys have tried to blame this entire fraud
12 scheme on.

13 MS. AL-SHABAZZ: Objection.

14 MR. FOLLY: That's who he's still --

15 MS. AL-SHABAZZ: Objection.

16 THE COURT: Just a moment.

17 Jury will disregard the last sentence about what the
18 defense lawyers were trying to do.

19 Go ahead.

20 MR. FOLLY: You've heard argument, ladies and
21 gentlemen, that Reginald Dewitt and Peter Kalkanis were the
22 only ones in on this fraud and that these three defendants
23 didn't know a thing about it. But then when Bryan Duncan
24 branches off in 2015, he's getting patients from Reginald
25 Dewitt.

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Rebuttal - Mr. Folly

1 Ladies and gentlemen, Bryan Duncan knew this was a
2 fraud all the way back in 2012. Witness after witness after
3 witness after witness at this trial told you that. But not
4 only that; when he switched things up in 2015, nothing changed.
5 Gordon, still his partner. Patients like Wanda Diaz and
6 Jasmond Cunningham, who you heard from both at this trial,
7 they're getting pulled out of homeless shelters to stage
8 accidents. Nothing changed in 2015.

9 Now I'm going to switch topics here and talk about
10 Ryan Rainford. Ladies and gentlemen, you know who that is.
11 You heard his name. Ryan Rainford, Ace, same person. And you
12 heard this argument, again, that Ryan Rainford didn't know what
13 was going on, was totally in the dark about what was happening
14 here. Doesn't add up with the evidence, ladies and gentlemen.
15 You heard from Willie Barbour. You heard from Kasheem Jones.
16 These were people that Ryan Rainford recruited himself into
17 this scheme. And one point on Kasheem Jones. Remember, when
18 he first did his accident, he went straight to the hospital.
19 That's what he was told to do. That's how the fraud scheme
20 worked during that time period. But then he wanted to get his
21 girlfriend Colette Ford in on this fraud scheme. So what did
22 he do? He called Ryan Rainford, because that was his connect,
23 and Rainford says, we're doing things differently now. Colette
24 Ford, she has to actually go to a spot, she has to
25 intentionally fall on the ground. Can't just go to the

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Rebuttal - Mr. Folly

1 hospital anymore and get the discharge paperwork. How would
2 Kasheem Jones be able to make that up? How would he know that
3 the operation had changed, that they were no longer just going
4 to the hospital and getting the paperwork, that now you
5 actually needed to stage the fall? How could he get that so
6 perfectly matched up with all the other testimony that you
7 heard at this trial? There's no way he could do that. There's
8 no way he would know that unless Ryan Rainford had told him.

9 And one other thing about Ryan Rainford. Think about
10 his role in this operation. He is entrusted with the money,
11 the checks, the cash. He is entrusted to hand envelopes of
12 cash to people in vans. You don't get entrusted to do that
13 unless you are fully on the inside, unless you know exactly
14 what is going on. And the evidence shows you that Ryan
15 Rainford knew exactly what was going on here.

16 So that brings us to Robert Locust. So I want to
17 respond to this argument yesterday. You heard it again and
18 again: Robert Locust was just a driver. Ladies and gentlemen,
19 let's get really clear on this. Robert Locust is not on trial
20 for being an Uber driver. That's not why we're here. That's
21 not what this case is about. Robert Locust is not on trial for
22 being an Uber driver, okay? He's on trial because he
23 participated in a fraud scheme for years.

24 MR. DINNERSTEIN: Objection, your Honor. That's not
25 the standard.

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Rebuttal - Mr. Folly

1 THE COURT: This jury knows that before it can convict
2 a defendant, it has to find beyond a reasonable doubt that the
3 government has proven every element of the charge.

4 Proceed.

5 MR. FOLLY: And we have. We have proven every element
6 of the charge beyond a reasonable doubt.

7 So there was this argument yesterday that Robert
8 Locust was just earning an honest living, an honest living in
9 which he was recruiting people to stage accidents and file
10 bogus lawsuits. That is not an honest living, ladies and
11 gentlemen. That is participating in a fraud scheme.

12 The first point here -- and Ms. Rothman, she walked
13 you through this with a great level of detail yesterday, so I'm
14 not going to go back through all of this again. But the first
15 point here is that Robert Locust recruited patients. So this
16 whole thing about him just being a driver, that's a total
17 distraction to get you to look the other way from the evidence
18 here, which shows you that Robert Locust recruited patients to
19 stage trip-and-fall accidents.

20 Now there was an argument that the only evidence of
21 that, ladies and gentlemen, is the testimony of Clarence
22 Tucker. That's simply not the case. There is so much more
23 evidence here, and I want to just remind you of a few pieces of
24 that evidence.

25 First of all, Clarence Tucker, that actually is

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Rebuttal - Mr. Folly

1 enough, ladies and gentlemen, because Clarence Tucker does not
2 have a reason in the world to come into this courtroom, to lie
3 under oath, to get his fiancée wrapped up in this by saying,
4 yes, she was with me when I went out to scout locations with
5 Robert Locust in order to stage an accident.

6 MR. DINNERSTEIN: Objection, your Honor. That's
7 improper argument.

8 THE COURT: I'll permit that.

9 MR. FOLLY: There's no reason, ladies and gentlemen,
10 that he would come in here, commit perjury --

11 THE COURT: Ladies and gentlemen, you understand, it's
12 really for you to decide whether he had any reason in the world
13 or not. I mean, it's not for this lawyer to tell you that.
14 You decide that.

15 Move on.

16 MR. FOLLY: And ladies and gentlemen, when you look at
17 the evidence here, ask yourselves if it makes sense that he
18 would come in here, lie under oath, throw his fiancée into the
19 mix with all this, say that she also committed a crime. Why
20 would he do that? There's no reason in the world, ladies and
21 gentlemen.

22 So let's also look at all the ways that Clarence
23 Tucker's testimony is backed up by the hard evidence in this
24 case.

25 So Government Exhibit 837, if we could publish that.

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Rebuttal - Mr. Folly

1 So the argument yesterday was that these records,
2 these toll records, they're actually not helpful. And of
3 course that was the argument, because when you look at these
4 records, they line up perfectly with Clarence Tucker's
5 testimony.

6 Look on May 2nd. That's the day before Tucker did the
7 staged accident with Locust. That's the day they went out and
8 they scouted locations. And there's a spike in their phone
9 calls on that day.

10 Then look at the next day, the day they actually go
11 out and they do the staged accident. Again, there's a spike in
12 the communications between Robert Locust and Clarence Tucker.
13 So there was this suggestion yesterday, well, maybe they're
14 talking about computer repairs. That's ridiculous. It's a
15 massive coincidence that the days that they're talking the most
16 about computer repairs are the days that Clarence Tucker told
17 you that he went out with Robert Locust to stage an accident?
18 And it's a massive coincidence that this spike on the graph is
19 another day when Clarence Tucker told you that he went out to
20 scout with Robert Locust for the location? A total sideshow.
21 Computer repairs had nothing to do with the spikes in calls on
22 that chart.

23 So then we got to the next argument, which is that,
24 well, you don't know if Clarence Tucker recruited Robert Locust
25 instead of Robert Locust recruiting Clarence Tucker. Ladies

J5mldun1

Rebuttal - Mr. Folly

1 and gentlemen, that is totally ridiculous. Robert Locust has
2 been participating in the fraud scheme for two years at this
3 point. It's 2017. And there wasn't a single witness at this
4 trial who told you that Clarence Tucker was in on this
5 operation, that he was someone, like Robert Locust, recruiting
6 people into this scheme. That argument makes no sense, ladies
7 and gentlemen. No sense whatsoever. It's obvious that Robert
8 Locust recruited Clarence Tucker and not the other way around.

9 So I also want to talk about Reginald Dewitt, because
10 you heard this argument on and on about how terrible Reginald
11 Dewitt is. That is not the issue here. It's not about whether
12 you like him; it's about whether you can trust what he told you
13 about Robert Locust. And think about this. He's friends with
14 Robert Locust. And what does he tell you? He tells you Robert
15 Locust told him he wanted to stage more accidents and that he
16 had staged some accidents. If Reginald Dewitt was going to
17 come up with a lie to frame Robert Locust, don't you think he
18 would have done a little bit better than that, he would have
19 said, I was with him, we went together, I heard him talking to
20 one of the recruits about how to stage the accidents? That's a
21 pretty easy lie to come up with. He didn't say that. He said,
22 Robert Locust told me that he staged some accidents. And the
23 most remarkable thing, ladies and gentlemen, is that his memory
24 on this, it's incredible. It matches up perfectly with the
25 intake sheets. He said, Robert Locust told me that he staged

J5mldun1

Rebuttal - Mr. Folly

1 an accident with a patient at a Wendy's on Utica Avenue in
2 Brooklyn. And then, ladies and gentlemen, you saw through
3 Peter Kalkanis the intake sheet, and what's in the upper left
4 corner on the ledger that Peter Kalkanis used to keep track of
5 which runner brought in which recruit? Rob. How is it
6 possible that Reginald Dewitt would have known exactly, down to
7 the street and location, where Robert Locust staged accidents,
8 unless Robert Locust told Reginald Dewitt.

9 And that's not it. There's more just like that. He
10 said he recruited patients from his building. And you saw
11 that, ladies and gentlemen. Clarence Tucker, he was from
12 Robert Locust's building. And within two months, ladies and
13 gentlemen, less than two months of that, you saw the intake
14 sheet from another patient from Robert Locust's building, and
15 in the upper left-hand corner, once again, is Rob's name. What
16 are the odds? Less than two months apart, Robert Locust brings
17 two people into this scheme from his building. It makes sense.
18 He started close to home. He was nervous about this. He
19 wasn't sure exactly how to do it, so he picked people close to
20 home.

21 Ladies and gentlemen, Ms. Rothman walked you through
22 other examples of this yesterday, other examples where the
23 things Reginald Dewitt told you about the patients that Robert
24 Locust recruited match up perfectly with the records.

25 So let's put that aside, because it's clear Robert

J5mldun1

Rebuttal - Mr. Folly

1 Locust recruited patients into this scheme. It could not be
2 more clear. Now let's focus on the driving that he was doing,
3 because again, if you listened to those arguments yesterday,
4 you would think that what this case is about is Robert Locust
5 working for Uber and taking some passengers to JFK Airport.
6 That is not what this case is about. He was driving people
7 around who were participating in a fraud scheme. He was
8 helping this fraud scheme succeed. He was essential to get
9 these recruits to go to get surgery, to go to get MRIs, to go
10 to get epidural injections, to go to see the lawyer. This was
11 critical. If the lawsuits were going to have any value, all of
12 this had to get done. And Peter Kalkanis needed someone
13 reliable to get this done. He gets Robert Locust a bigger car.
14 He helps him get that car, ladies and gentlemen. And you heard
15 what he said about it. It was helpful because they could fit
16 more passengers, more recruits into the car.

17 And ladies and gentlemen, there was argument about,
18 well, Peter Kalkanis is over here, he made \$2 million, and
19 Robert Locust is getting paid a salary of about \$40,000 a year.
20 He's getting paid a salary for his participation in this fraud
21 scheme. He was driving around criminals as they were actively
22 committing fraud. That is the driving he was doing, ladies and
23 gentlemen.

24 Ladies and gentlemen, I'm going to move on from this
25 point, but before I do, I want to highlight something here.

J5mldun1

Rebuttal - Mr. Folly

1 Again, this all boils down to this one question: Did Robert
2 Locust know what was going on here? The answer is clear. Of
3 course he did, because he recruited people to stage accidents,
4 so it's obvious he knew. But let's just think, even if he
5 hadn't recruited people, which he did, even if he was just
6 driving these people around in furtherance of this fraud
7 operation, think about everything he would be seeing. Hundreds
8 of patients, the exact same types of locations for the
9 accidents, the exact same types of injuries, again and again
10 and again. They're going to the same MRI facility, they're
11 going to the same doctors, they're getting the same surgeries,
12 they're getting paid in cash in the back of vans after they get
13 surgery. Does this add up, ladies and gentlemen? Of course
14 this doesn't add up. It's obvious what was going on here,
15 ladies and gentlemen. Even if Locust did not know for certain,
16 he is still guilty. He was aware there was a high probability
17 that these patients had staged accidents and he took --

18 MR. DINNERSTEIN: Objection, your Honor. That's not
19 the standard.

20 THE COURT: Yes. Again, ladies and gentlemen, the
21 government's burden is proof beyond a reasonable doubt.
22 Remember that.

23 MR. FOLLY: And he took conscious steps to avoid
24 confirming that fact, ladies and gentlemen. He knew. There's
25 no question about that.

J5mldun1

Rebuttal - Mr. Folly

1 Finally, Mr. Dinnerstein spoke yesterday about the law
2 of conspiracy. Judge Stein is going to give you instructions
3 on this in just a moment, and you should listen very carefully.
4 But there was a suggestion that because Robert Locust joined
5 the conspiracy later, that somehow that's relevant to whether
6 he was actually a part of the conspiracy. And I expect that
7 Judge Stein will tell you, it does not matter when a particular
8 defendant here joined the conspiracy. They don't need to have
9 joined the conspiracy at the same time. It doesn't matter
10 whether some were in the conspiracy longer than others. Again,
11 that does not matter. It doesn't even matter if some members
12 of the conspiracy don't even know the identity of some of the
13 other members of this conspiracy. That doesn't matter either.
14 So don't let that argument, ladies and gentlemen, distract you
15 here.

16 Ladies and gentlemen, I'm going to sit down in just a
17 minute. But before I do, I just want to leave you with one
18 thing. For years, years, these three men sitting here in this
19 courtroom were essential members of this fraud scheme. You
20 heard about that from witness after witness after witness at
21 this trial. There's been the suggestion that all of these
22 witnesses got together and somehow came up with some elaborate
23 conspiracy to frame these defendants, they got all their
24 stories straight --

25 MR. SCHOLAR: Objection, Judge. That's not accurate.

J5m1dun1

Charge

1 THE COURT: It's argument. I'll permit it.

2 MR. FOLLY: They got all their stories straight, they
3 lined them up just perfectly to match up with all the other
4 evidence in this case that they knew absolutely nothing about,
5 ladies and gentlemen, and that they framed themselves. They
6 came in here and got on the witness stand and said, yes, I was
7 a participant in this fraud scheme; yes, my brother, my
8 daughter, my wife, my girlfriend, my fiancée, were also
9 participants in this fraud scheme. Why would they frame
10 themselves? Why would they frame people who are close to
11 them -- family members, friends? There's no reason that all of
12 those different witnesses, most of whom had never heard of each
13 other, there's absolutely no reason that they would all come in
14 here and make up a story about what happened and, in the
15 process, frame themselves, frame their family members, just to
16 point the finger at these defendants. That argument makes no
17 sense whatsoever, ladies and gentlemen.

18 You saw firsthand what the result of these defendants'
19 actions was. People got surgeries they never needed.
20 Businesses and insurance companies paid out millions of dollars
21 for bogus fraudulent lawsuits, and these defendants made a
22 living off of this. But now here, in federal court, it's time
23 for these three men to be held accountable for their actions.
24 There is only one verdict that is consistent with all of the
25 evidence in this case -- that these three defendants are

J5m1dun1

Charge

1 guilty.

2 THE COURT: All right. Thank you, Mr. Folly.

3 Ladies and gentlemen, I now will give you the charge.
4 I'm going to tell you what the law is, and you have to apply
5 the law as I give it to you to the facts as you find them.

6 We've been here about an hour this morning. So for
7 about a half hour, I'll read the charge, then I'll give you a
8 midmorning break, and then we'll complete the charge. The
9 charge will take about an hour, hour and a half or so.

10 You don't have to memorize this charge. I am going to
11 give you a copy of it, and in fact, if each of you want copies,
12 we can easily make copies.

13 I'm giving copies of the charge to the parties. The
14 charges are as I discussed with the parties previously.

15 I'm going to instruct you on the law you will apply to
16 the facts. You will determine the facts in accordance with
17 these instructions on the law.

18 You are vital to the administration of justice. I
19 hope you fully appreciate your importance. I truly do. It's a
20 tradition and a significant safeguard of our individual
21 liberties that parties involved in criminal matters have a jury
22 chosen from the community to decide questions of fact and on
23 that basis render a verdict.

24 It's your duty to decide whether or not the guilt of
25 each defendant has been proved beyond a reasonable doubt. You

J5m1dun1

Charge

1 pass on and decide the facts in this case. I, as the judge, do
2 not find the facts. You are the sole and exclusive judges of
3 the facts. You pass on the weight of the evidence; you
4 determine the credibility of the witnesses; you resolve any
5 conflicts that there are in the testimony; and you draw
6 whatever reasonable inferences you decide to draw from the
7 facts as you have determined them. This is a very great
8 responsibility, and you have to exercise it with complete
9 fairness and impartiality. Your decision must be based on the
10 evidence or lack of evidence, and it cannot be influenced by
11 bias, by prejudice, or by sympathy.

12 You must accept the law as I state it to you in these
13 instructions and to apply it to the facts as you decide them.

14 You must not substitute your concept of what the law
15 should be for what I tell you the law is. Just as you alone
16 find the facts, I alone decide what the law is, and you are
17 duty bound to accept the law as I state it to you. If any
18 attorney has stated a legal principle different from any that I
19 state to you in these instructions -- and that goes for not
20 only the summations but at any time in the trial -- it's these
21 instructions that you have to follow. Don't single out any one
22 instruction or any one word or phrase in an instruction as
23 alone stating the law. Consider these instructions as a whole.

24 You will find the facts here, but you must accept the
25 law as I state it to you and apply that law to the facts as you

J5mldun1

Charge

1 find them. The result of the work is going to be the verdict
2 that you return.

3 I'm going to give you some general principles. I'll
4 explain the burden of proof further; I'll tell you about the
5 charges in the indictment; I'll tell you about the substantive
6 law; and then I'll give you some concluding instructions.

7 You know you must perform your duty of finding the
8 facts without bias or prejudice as to any party. All parties
9 stand as equals before juries in the courts of the United
10 States. You must disregard any feelings you may have about
11 each defendant's race, religion, national origin, sex, or age.
12 It also would be improper for you to consider any personal
13 feelings you may have about the race, religion, national
14 origin, sex, or age of any witness or anyone involved in this
15 case. And it also would be improper for you to allow any
16 feelings you might have about the nature of the crime charged
17 to interfere with your decision-making process.

18 The fact that the government is a party and the
19 prosecution is brought in the name of the United States does
20 not entitle the government or its witnesses to any greater
21 consideration than that given you by any other party. By the
22 same token, you can't give it less consideration. The
23 government and each of the three defendants here stand on equal
24 footing before you. Your verdict has to be based solely on the
25 evidence or lack of evidence.

J5m1dun1

Charge

1 Also, the personalities and the conduct of lawyers are
2 not in any way in issue. If you have formed opinions of any
3 kind as to any of the lawyers here, whether favorable or
4 unfavorable, those opinions should not enter into your
5 deliberations.

6 You are not to be swayed by sympathy. You must be
7 guided solely by the evidence here, and the crucial, hard-core
8 question that you must ask yourselves as you go through the
9 evidence is, as you know: Has the government proven the guilt
10 of each defendant beyond a reasonable doubt?

11 It is for you alone to decide whether the government
12 has proven that each defendant is guilty of the crimes charged
13 solely on the basis of the evidence and subject to the law as I
14 charge you. It must be clear to you that once you let fear,
15 prejudice, or bias or sympathy interfere with your thinking,
16 there is a risk that you will not arrive at a true and just
17 verdict.

18 If you have a reasonable doubt as to a particular
19 defendant's guilt, do not hesitate for any reason to find the
20 verdict of acquittal. On the other hand, if you should find
21 that the government has met its burden of proving that
22 defendant's guilt beyond a reasonable doubt, you should not
23 hesitate to render a verdict of guilty because of sympathy or
24 for any other reason.

25 Although the defendants have been indicted, you must

J5m1dun1

Charge

1 remember that an indictment is simply an accusation. It's not
2 evidence. And each of the three defendants here has pled not
3 guilty to the indictment.

4 As a result, as you know, the burden is on the
5 government to prove guilt beyond a reasonable doubt. This
6 burden on the government never shifts to a defendant, because
7 the law never imposes on a defendant in a criminal case the
8 burden or duty of calling any witness or producing any
9 evidence.

10 The law presumes each defendant to be innocent of each
11 of the charges against that defendant. I therefore instruct
12 you, ladies and gentlemen of the jury, that you must presume
13 each defendant is innocent throughout your deliberations until
14 such time, if ever, you, as a jury, are satisfied that the
15 government has proven that defendant guilty beyond a reasonable
16 doubt.

17 Each of the three defendants here begins this trial
18 with a clean slate. This presumption of innocence alone is
19 sufficient to acquit a defendant unless you, as jurors, are
20 unanimously convinced beyond a reasonable doubt of their guilt
21 after a careful and impartial consideration of all of the
22 evidence here. If the government fails to sustain its burden,
23 you must find the defendants not guilty.

24 This presumption was with each defendant when the
25 trial began and remains with each defendant even now as I speak

J5m1dun1

Charge

1 to you, and will continue with the defendants into your
2 deliberations unless and until you are convinced that the
3 government has proven them guilty beyond a reasonable doubt.

4 I have said that the government must prove each
5 defendant's guilt beyond a reasonable doubt. The question
6 therefore is, what is a reasonable doubt? The words almost
7 define themselves. It's a doubt based on reason and common
8 sense. It is a doubt that a reasonable person has after
9 carefully weighing all of the evidence. It is a doubt that
10 would cause a reasonable person to hesitate in a matter of
11 importance in his or her personal life. Proof beyond a
12 reasonable doubt must therefore be proof of such a convincing
13 character that a reasonable person would not hesitate to rely
14 and act upon it in the most important of his own affairs. A
15 reasonable doubt is not a caprice or a whim; it's not a
16 speculation or suspicion; it's not an excuse to avoid the
17 performance of an unpleasant duty. And it's not sympathy.

18 You know that in a criminal case, the burden at all
19 times is upon the government to prove guilt beyond a reasonable
20 doubt. The law does not require that the government prove
21 guilt beyond all possible doubt. Proof beyond a reasonable
22 doubt is sufficient to convict. This burden never shifts to
23 the defendants, which means it's always the government's burden
24 to prove each of the elements of the crime charged beyond a
25 reasonable doubt. If, after fair and impartial consideration

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Charge

1 of all the evidence, you have any reasonable doubt about the
2 guilt of a defendant, it's your duty to acquit the defendant.
3 On the other hand, if, after fair and impartial consideration
4 of all of the evidence, you are satisfied of the defendant's
5 guilt beyond a reasonable doubt, you must vote to convict.

6 The fact that one party called more witnesses and
7 introduced more evidence than the other does not mean that you
8 should necessarily find the facts in favor of the side offering
9 the most witnesses. By the same token, you do not have to
10 accept the testimony of any witness who has not been
11 contradicted or impeached if you find that witness not to be
12 credible. You also have to decide which witnesses to believe
13 and which not to believe and which facts are true and which
14 facts are not true. To do this, you have to look at all the
15 evidence, drawing upon your own common sense and personal
16 experience and good judgment.

17 I'm going to discuss in a moment the criteria for
18 evaluating credibility. At this point, keep in mind what you
19 know, that the burden of proof is always on the government and
20 the defendants don't have to call any witnesses or offer any
21 evidence, since you must presume them to be innocent.

22 Now in determining the facts, you rely upon your own
23 recollection of the evidence. You know what evidence is. It's
24 the testimony of witnesses and the exhibits that have been
25 received. You know there are two types of evidence -- direct

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Charge

1 evidence and circumstantial evidence.

2 You know that direct evidence is evidence when a
3 witness is testifying to a fact based on what that witness saw,
4 heard, or observed; and you know that circumstantial evidence
5 is evidence that tends to prove a disputed fact indirectly by
6 proof of other facts.

7 You remember the example about the umbrella that I
8 gave you when this trial started. The fact of the wet
9 umbrella, which you can directly observe, is circumstantial
10 evidence that it's raining outside. It's certainly logical for
11 you to conclude that it's raining outside if you see a wet
12 umbrella. By the same token, as I said, somebody may have put
13 an umbrella under a faucet, but it's a reasonable inference to
14 draw that it's raining outside. Whether or not to draw a
15 particular inference is a matter exclusively for you because
16 it's a determination of fact.

17 Many material facts, such as state of mind, are rarely
18 susceptible to proof by direct evidence. Usually such facts
19 are established by circumstantial evidence and the reasonable
20 inferences you draw. Circumstantial evidence may be given as
21 much weight as direct evidence. The law makes no distinction
22 between direct and circumstantial evidence, but simply requires
23 that before convicting a defendant, you must be satisfied of
24 that defendant's guilt beyond a reasonable doubt based on all
25 the evidence in the case.

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Charge

1 Now you also know that certain things you've heard and
2 seen during this trial are not evidence. The indictment isn't
3 evidence; it's simply an accusation.

4 The statements and arguments of the lawyers are not
5 evidence. Questions put to a witness are not evidence; it's
6 just the answer that's evidence.

7 Don't draw any inference or conclusion for or against
8 any party because of a lawyer's objections or my rulings on the
9 objections. Lawyers, to do their job, they're supposed to
10 object if they think a question is legally impermissible.

11 Nothing I say is evidence. Do not draw any inference
12 from any of my rulings. My rulings are simply on legal issues,
13 not factual issues. I have no opinion on the facts of this
14 case. It's for you to judge the facts.

15 Don't concern yourself with what was said at sidebars.

16 At times I may have questioned a witness. Undoubtedly
17 these were questions that I intended to help clarify the
18 presentation of evidence and perhaps bring out something that I
19 thought may have been unclear. But I have no view on the
20 credibility of any witness or of any of the facts here.

21 You've heard testimony about evidence seized in
22 connection with searches that were conducted by law enforcement
23 officers. Evidence obtained from those searches is properly
24 admitted and may be properly considered by you.

25 Whether you approve or disapprove of how it was

J5m1dun1

Charge

1 obtained must not enter into your deliberations. I hereby
2 instruct you that the government's use of evidence seized in
3 connection with searches in this case is entirely lawful.

4 You must, therefore, regardless of your personal
5 opinions, give that evidence full consideration along with all
6 the other evidence in determining whether the government has
7 proved a defendant's guilt beyond a reasonable doubt.

8 Some of the exhibits that were admitted into evidence
9 were in the form of charts and summaries. For those charts and
10 summaries that were admitted into evidence, you should consider
11 them as you would any other evidence.

12 Now you've had the opportunity to observe the
13 witnesses. You must now consider whether the witnesses were
14 truthful and accurate. A witness could believe that that
15 witness was being truthful, yet be mistaken and not be able to
16 recall facts accurately, or a witness could take the oath and
17 still intentionally testify falsely.

18 It's important for you to carefully listen to and
19 observe the witnesses and think about their testimony.

20 Now you have to decide whether the witnesses told the
21 truth. Did they know what they were talking about? How do you
22 decide that? It's simply a matter of using your common sense,
23 your good judgment, and your life's experience.

24 Consider how good an opportunity a witness had to
25 observe or hear what the witness was testifying about. A

J5mldun1

Charge

1 witness can be honest but mistaken. How did the witness's
2 testimony impress you? Did you think the witness was honest,
3 candid? Were the answers direct or were they evasive? How was
4 their demeanor? What was the strength of the witness's
5 recollection? Consider whether outside factors may have
6 affected a witness's ability to perceive what was happening.
7 Think about the substance of the testimony. Do you think the
8 witness was straightforward? Do you think the witness was
9 trying to conceal something? How did any particular piece of
10 testimony compare with other proof here? Was it contradicted?
11 Is it consistent with other evidence?

12 If a witness made statements in the past that are
13 inconsistent with that witness's testimony during the trial,
14 you may consider that in deciding how much of that testimony,
15 if any, to believe. You may consider whether the witness
16 purposely made a false statement or whether it was an innocent
17 mistake. Consider whether the inconsistency concerns an
18 important fact or whether it had to do with a small detail.
19 Did the witness have an explanation for it? And, if so, did
20 that explanation appeal to your common sense?

21 Consider whether a witness had any possible bias, any
22 relationship to a party, any motive to testify falsely, any
23 possible interest in the outcome of the case. Such a bias or
24 relationship does not necessarily make the witness unworthy of
25 belief, but these simply are factors that you can consider.

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Charge

1 In evaluating the credibility of the witnesses, take
2 into account any evidence that the witness who testified may
3 benefit in some way from the outcome of this case. Such an
4 interest in the outcome creates a motive to testify falsely.
5 It may sway the witness to testify in a way that advances the
6 witness's own interests. If you find that any witness whose
7 testimony you are considering may have an interest in the
8 outcome of this case, then you should bear that in mind when
9 evaluating the credibility of the witness's testimony and
10 accept it with great care.

11 I don't mean to suggest that every witness who has an
12 interest in the outcome of the case is going to testify
13 falsely. You decide to what extent, if any, the witness's
14 interest has affected or colored that witness's testimony. You
15 decide -- not the lawyers, not the witnesses, and not me --
16 what the credibility of the witnesses were who appeared here
17 and the weight that their testimony deserves.

18 Now you've heard evidence during this trial that
19 witnesses have discussed the facts of the case and their
20 testimony with lawyers before they came here to testify.

21 Although you may consider that when you are evaluating
22 a witness's credibility, there is nothing either unusual or
23 improper about a witness meeting with lawyers before testifying
24 so that the witness can be aware of the subjects the witness is
25 going to be questioned about, he can focus on those subjects,

J5m1dun1

Charge

1 and he will have the opportunity to review relevant exhibits
2 before being questioned about them. Such consultation helps
3 conserve your time and the Court's time. In fact, it would be
4 unusual for a lawyer to call a witness without such prior
5 consultations.

6 Again, the weight you give to the fact or the nature
7 of the witness's preparation for his testimony and what
8 inferences you draw from that preparation are matters for you.

9 You've also heard testimony of law enforcement
10 officials. The fact that a witness may be employed by the
11 federal or municipal government as a law enforcement official
12 does not mean that his testimony is necessarily deserving of
13 more or less consideration or greater or lesser weight than
14 that of an ordinary witness.

15 It's your decision, after reviewing all of the
16 evidence, whether to accept the testimony of that law
17 enforcement witness and to give that testimony whatever weight,
18 if any, you determine that it deserves.

19 You have heard evidence that a witness made a
20 statement on an earlier occasion that counsel argues is
21 inconsistent with that witness's trial testimony. Evidence of
22 a prior inconsistent statement is not to be considered by you
23 as affirmative evidence bearing on a defendant's guilt.
24 Evidence of the prior inconsistent statement was placed before
25 you for the more limited purpose of helping you decide whether

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Charge

1 to believe the trial testimony of the witness who contradicted
2 himself. If you find that the witness made an earlier
3 statement that conflicts with his trial testimony, you may
4 consider that fact in deciding how much of his trial testimony,
5 if any, to believe.

6 You may consider whether the witness purposely made a
7 false statement or whether it was an innocent mistake; whether
8 the inconsistency concerns an important fact or a small detail;
9 whether the witness had an explanation for the inconsistency,
10 and whether that explanation appealed to your common sense.

11 It's your duty, ladies and gentlemen, based on all the
12 evidence and your own good judgment, to determine whether the
13 prior statement was inconsistent in fact, and if so, how much,
14 if any, weight to give to that statement in determining whether
15 to believe all or part of that witness's testimony.

16 You've also heard the testimony of witnesses who have
17 pled guilty to charges arising out of the facts that are
18 related to the issues here. I instruct you that you are to
19 draw no inference or conclusion of any kind about the guilt of
20 the defendants on trial here from the fact that a prosecution
21 witness pled guilty to a similar charge. The decision of the
22 witness to plead guilty was a personal decision that that
23 witness made about his or her own guilt. You cannot use that
24 decision in any way as evidence against the defendants on trial
25 here. That was a decision by that person to plead guilty.

J5m1dun1

Charge

1 I can tell you that there's nothing improper in the
2 government's use of a cooperating witness. Do not concern
3 yourself with how you personally feel about the use of a
4 government cooperating witness. Your concern is to decide
5 whether the government has proven the guilt of each defendant
6 beyond a reasonable doubt regardless of whether evidence was
7 obtained by use of a cooperating witness. It is the law in
8 federal courts that the testimony of such a witness may be
9 enough in itself for conviction if the jury finds that the
10 testimony establishes guilt beyond a reasonable doubt.

11 When a cooperating witness testifies, that testimony
12 should be examined with greater scrutiny than the testimony of
13 an ordinary witness. You should consider whether the
14 cooperating witness received any benefits or promise from the
15 government or otherwise benefited from his cooperation with the
16 government that would motivate the witness to testify falsely
17 against the defendant. It does not follow, however, that
18 simply because a person has admitted to participating in one or
19 more of the crimes, that he is incapable of giving truthful
20 testimony.

21 (Continued on next page)

22

23

24

25

J5MTDUN2

Charge

1 THE COURT: I have given you some general
2 considerations on credibility. I'm not going to repeat them
3 here, I'm not going to repeat the arguments that each side has
4 made, but I do want you to consider certain things, or you may
5 want to consider certain things on the subject of cooperating
6 witnesses. It's entirely up to you, ladies and gentlemen.

7 Ask yourselves whether these cooperating witnesses
8 would benefit more by lying or by telling the truth. Was their
9 testimony made up because they believed or hoped they would
10 somehow receive favorable treatment if they testified falsely,
11 or did they believe that their interests would be best served
12 by testifying truthfully? If you believe that the witness was
13 motivated by hope of personal gain, was the motivation one that
14 would cause him to lie or her to lie, or was it one which would
15 cause him or her to tell the truth? Did the motivation color
16 that witness's testimony?

17 As with any witness, let me emphasize that the issue
18 of credibility does not have to be decided on the basis of all
19 or nothing. Even if you find that a witness testified falsely
20 in one part, you may still accept that testimony in other parts
21 or you may disregard all of it. It's up to you to decide that.
22 Look at all the evidence in deciding what credence and what
23 weight, if any, you will want to give to the cooperating
24 witness.

25 Ladies and gentlemen, it's noon, let's take a

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Charge

1 ten-minute break and we'll come back.

2 (Recess taken)

3 (Jury not present)

4 THE COURT: All lawyers are here, the defendants are
5 here.

6 (Jury present)

7 THE COURT: Ladies and gentlemen, I don't normally
8 allow coffee, but I will make an exception this time. Just be
9 very, very careful. Normally it's simply water but the jury
10 obviously saw -- I'll allow it this time.

11 Ladies and gentlemen, you have heard the testimony
12 that when the police apprehended one or more of the defendants
13 they recovered evidence from that defendant. The evidence
14 allegedly obtained at the time of the arrest was properly
15 admitted and may be properly considered by you. Whether you
16 approve or disapprove of how it was obtained should not enter
17 into your deliberations. I instruct you that the government's
18 use of this evidence is entirely lawful. Regardless of any
19 personal opinion you may have, you must give this evidence full
20 consideration, along with all the other evidence in the case.

21 During the trial you also have heard testimony of
22 witnesses and arguments by the lawyers that the government did
23 not utilize specific investigative techniques. You may
24 consider these facts in deciding whether the government has met
25 its burden of proof because you should look to all the evidence

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Charge

1 or lack of evidence in deciding whether a defendant guilty.
2 However, I also instruct you that there's no legal requirement
3 that the government use any specific investigative technique to
4 prove its case. Law enforcement techniques are not your
5 concern. Your concern is solely to determine whether or not,
6 on the evidence or lack of evidence, each defendant's guilt has
7 been proved beyond a reasonable doubt.

8 The defendants did not testify in this case. Under
9 our Constitution, a defendant has no obligation to testify or
10 to present any other evidence, because, as you know, it's the
11 government's burden to prove that defendant guilty beyond a
12 reasonable doubt, and that burden remains with the prosecution
13 throughout the entire trial and never shifts to the defendant.
14 The defendant is never required to prove that he is innocent.

15 You may not attach any significance to the fact that
16 the three defendants here did not testify. No adverse
17 inference against any of them may be drawn by you because that
18 defendant did not take the witness stand. You may not consider
19 this against the defendant in any way in your deliberations in
20 the jury room.

21 You also may not draw any inference, favorable or
22 unfavorable, toward the government or a defendant from the fact
23 that any person other than the defendants are not on trial
24 here. You may not speculate as to the reasons why other
25 persons are not on trial. These matters are wholly outside

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Charge

1 your concern and have no bearing on your function as jurors.
2 In other words, your job is to determine whether or not these
3 defendants are guilty or not. Don't be concerned with why
4 other people aren't here, focus on these three defendants
5 alone.

6 There are people whose names you heard during the
7 course of the trial but who did not testify, and one or more of
8 the attorneys has referred to their absence from this trial. I
9 hereby instruct you that each party had an equal opportunity or
10 lack of opportunity to call any witness. You should not draw
11 any inference or reach any conclusion as to what they would
12 have testified to had they been called. Their absence must not
13 affect your judgment in any way. However, remember my
14 instruction that the law does not impose on a defendant in a
15 criminal case the burden or duty of calling any witness or
16 producing any evidence.

17 You have also heard the testimony of witnesses who
18 have testified under grant of immunity from me, which is formal
19 immunity, or have been promised by the government in a written
20 agreement that in consideration for truthful testimony by them
21 and their cooperation with the government, they will not be
22 prosecuted by the federal government for certain crimes which
23 they may have admitted either here in court or in any
24 interviews with the prosecutors. That's called informal
25 immunity.

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Charge

1 With respect to both categories of witnesses, that is
2 those who have formal immunity and those who have informal
3 immunity, what this means is that the testimony of the witness
4 may not be used against her or him in a criminal case except
5 for the prosecution for perjury or for giving a false statement
6 or otherwise failing to comply with the immunity order of this
7 Court or the agreement they entered into with the Office of the
8 U.S. Attorney for the Southern District of New York.

9 I instruct you that the government is permitted to
10 enter into non-prosecution agreements and is entitled to call
11 as witnesses people to whom these promises have been given.
12 You may convict a defendant on the basis of such a witness's
13 testimony alone if you find that that testimony indeed proves
14 that defendant guilty beyond a reasonable doubt.

15 However, the testimony of a witness who has been given
16 a written non-prosecution agreement by the government should be
17 examined by you with greater care than the testimony of an
18 ordinary witness. You should scrutinize it closely to
19 determine whether or not it has colored in such a way as to
20 place guilt upon the defendant in order to further that
21 witness's own interests, for such a witness, confronted with
22 the realization that she could win her own freedom by helping
23 to convict another, has a motive to testify falsely. So such
24 testimony should be scrutinized by you with great care, and you
25 should act upon it with caution if you believe it to be true.

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Charge

1 If you determine to accept the testimony, you may give it such
2 weight, if any, that you believe it deserves.

3 One final note, it's no concern of yours why the
4 government made agreements with witnesses. Your only concern
5 is to decide whether the witness was truthful when he
6 testified. Look to all the evidence to decide what weight, if
7 any, you will give to the witness's testimony.

8 Again, the issue of credibility doesn't have to be
9 decided in an all-or-nothing fashion, you could accept a
10 witness's testimony in part and reject it in part, you could
11 disregard all of it and you could accept all of it. That's a
12 determination for you.

13 Now let's go to the indictment. The defendants here,
14 Mr. Duncan and Mr. Locust and Mr. Rainford, have been charged
15 in an indictment, and you know an indictment is simply an
16 accusation, it is simply the means by which a criminal case is
17 started. It's not evidence, it's not proof, it creates no
18 presumption and it permits no inference that the defendants are
19 guilty. You are to give no weight to the fact that an
20 indictment has been returned by a grand jury against these
21 defendants.

22 Before you begin deliberating I'm going to give you a
23 copy of the indictment, but let me summarize the charges now.
24 The indictment contains six counts, that is, six charges.

25 Count One charges that from at least in or about

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Charge

1 January 2013, up to and including in or about April 2018,
2 Mr. Duncan, Mr. Locust and Mr. Rainford engaged in a conspiracy
3 to commit mail and wire fraud in violation of 18 USC 1349 in
4 connection with an alleged scheme to defraud businesses and
5 insurance companies by staging accidents and filing fraudulent
6 lawsuits arising from those staged accidents.

7 A conspiracy is a criminal agreement to violate the
8 law. The counts in the indictment that allege conspiracy
9 offenses are different from those alleging substantive
10 offenses. Unlike a conspiracy charge, which is a charge of
11 agreeing to commit certain offenses, a substantive count
12 alleges the actual commission of a criminal offense.

13 Count Two of the indictment charges that from
14 January 2013 up to April 2018 the defendants committed the
15 substantive crime of mail fraud in violation of 18, USC, 1341
16 and 2, in connection with the same alleged scheme I described
17 in relation to Count One.

18 Count Three charges from those same dates, that is,
19 2013 to 2018, the defendants committed the substantive crime of
20 wire fraud in violation of 18, USC, 1343 and 2, in connection
21 with the same scheme I described in relation to Count One.

22 Count Four charges from 2015 until 2018 the defendant
23 Bryan Duncan engaged in a separate conspiracy to commit mail
24 and wire fraud in violation of 18, USC, 1349 in connection with
25 an alleged scheme to defraud that was substantially similar to

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Charge

1 the one I described in Count One. The government in essence
2 alleges that in or about 2015 Mr. Duncan withdrew from the
3 conspiracy that's charged in Count One and entered into a
4 separate conspiracy to commit mail and wire fraud which
5 operated in essentially the same way as the conspiracy charged
6 in Count One did.

7 Count Five charges from 2015 to 2018 Mr. Duncan
8 committed mail fraud in violation of 18, USC, 1341 and 2 in
9 connection with the same alleged scheme as described in Count
10 Four.

11 Count Six charges from 2015 to 2018 Mr. Duncan
12 committed wire fraud in violation of 18, USC, 1343 and 2, in
13 connection with the same conspiracy I described in relation to
14 Count Four.

15 That's a summary of all six counts. You have to
16 consider each count and each defendant separately. And I'm
17 going to give you a verdict sheet which will help your
18 deliberations, it will help guide your deliberations. But you
19 have to consider each count and each defendant separately.
20 Whether you find the defendant guilty or not guilty to one and
21 offense should not affect your verdict when you consider that
22 defendant in regard to any other offense.

23 Let's go in more detail in Counts One through Six.

24 As I said, there are certain counts that are
25 conspiracy counts and certain counts that are substantive

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Charge

1 counts. Conspiracy counts allege agreements to commit certain
2 offenses. The substantive counts are based on the actual
3 commission of the offenses or the aiding and abetting others to
4 actually commit offenses.

5 Is that clear? There are certain counts that allege a
6 conspiracy to the commit crimes, and there are other counts
7 that allege the commission of the crimes themselves.

8 A conspiracy to commit a crime is an entirely separate
9 and different offense from the substantive crime which may be
10 the object of that conspiracy. Congress has deemed it
11 appropriate to make conspiracy, standing alone, a separate
12 crime, even if the object of the conspiracy is not achieved.
13 This is because collective criminal activity poses a greater
14 threat to public safety and welfare than individual conduct,
15 and increases the likelihood of success of a particular
16 criminal venture.

17 The essence of the crime of conspiracy is an agreement
18 or understanding to violate other laws. Thus, if a conspiracy
19 exists, even if it fails, it's still punishable as a crime.
20 Consequently, in a conspiracy charge, there's no need to prove
21 that the crime that was the objective of the conspiracy was
22 actually committed.

23 By contrast, the substantive counts require proof that
24 the crime charged was actually committed but do not require
25 proof of an agreement. Of course, if the defendant both

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Charge

1 participates in a conspiracy to commit a crime and then
2 actually commits that crime, that defendant may be guilty of
3 both the conspiracy and the substantive crime.

4 Let's first turn to the substantive crimes and then
5 we'll go to the conspiracy crimes, because it's easier for me
6 to describe the substantive crimes first, then we'll have a
7 better understanding when I get to the conspiracy crimes.

8 Counts Two and Five allege the substantive crime of
9 mail fraud. Count Two charges that Duncan, Locust and Rainford
10 committed mail fraud from January 2013 up to April 2018. Count
11 Five charges Mr. Duncan alone with a separate count of mail
12 fraud from 2015 until April 2018.

13 The relevant part of that statute states:

14 Whoever having devised or intending to devise any
15 scheme or artifice to defraud, or for obtaining money or
16 property by means of false or fraudulent pretenses,
17 representations or promises for the purpose of executing such
18 scheme or artifice, or attempting to do so, places in any post
19 office or authorized depository for mail matter, any matter or
20 thing whatever to be sent or delivered by the postal service,
21 or takes and receives therefrom any such matter or thing or
22 knowingly causes to be delivered by mail, according to the
23 direction thereon, or at the place at which it is directed to
24 be delivered by the person to whom it is addressed, any such
25 matter or thing, shall be guilty of a federal crime.

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Charge

1 For the substantive mail fraud counts, the government
2 has to prove three elements beyond a reasonable doubt: One,
3 the existence of either a scheme or artifice to defraud or a
4 scheme or artifice to obtain money or property by means of
5 materially false and fraudulent pretenses, representations, or
6 promises. So there has to be a scheme, that's the first one.

7 Second, that the defendant knowingly and willfully
8 devised or participated in the scheme or artifice to defraud
9 with knowledge of its fraudulent nature and with the specific
10 intent to defraud, or that he knowingly and intentionally aided
11 and abetted others in the scheme -- so the second element is
12 participation -- and third, that in executing the scheme, the
13 defendant used or caused the use of the mails or private or
14 commercial interstate carrier.

15 So the three elements are the existence of the scheme,
16 the participation in the scheme, and the use of the mails in
17 connection with the scheme.

18 So let's look at element one of Counts Two and Five
19 those are the substantive mail fraud counts.

20 The first element the government has to prove beyond a
21 reasonable doubt is that there was a scheme or artifice to
22 defraud by means of false or fraudulent pretenses,
23 representations or promises.

24 A "scheme or artifice" is simply a plan for the
25 accomplishment of an object. "Fraud" is a general term that

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Charge

1 includes all possible means by which a person seeks to gain
2 some unfair advantage over someone else by false
3 representations, false suggestions, false pretenses or
4 concealment of the truth. Thus, a scheme to defraud is merely
5 a plan to deprive another of money or property by trick,
6 deceit, deception or swindle.

7 Apart from proving a scheme or artifice to defraud, as
8 I have explained it to you, the mail fraud statute
9 alternatively provides that it could be satisfied by the
10 existence of scheme or artifice to obtain money or property by
11 means of false or fraudulent pretenses, representations or
12 promises. Such things are fraudulent if they were made falsely
13 and with intent to deceive. A representation, statement, claim
14 or document may also be fraudulent if it contains half-truths
15 or if it conceals material facts in a manner that makes what is
16 said or represented deliberately misleading or deceptive.

17 The deception does not have to be premised on spoken
18 or written words alone. The arrangement of words or the
19 circumstances in which they are used may convey the false and
20 deceptive appearance. If there is deception, the manner which
21 it is accomplished does not matter.

22 This element does not require that any particular
23 person actually relied on or actually suffered damages as a
24 consequence of any fraudulent representation or concealment of
25 facts. Nor need you find that the defendant you are

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Charge

1 considering profited from the fraud. It is enough that a false
2 statement or statement omitting material facts that made what
3 was said deliberately misleading was made as part of a
4 fraudulent scheme in the expectation that it would be relied
5 on. You must concentrate on whether there was such a scheme,
6 not on the consequences of the scheme. Of course, proof
7 concerning the accomplishment of the goals of the scheme may be
8 the most persuasive evidence of the existence of the scheme
9 itself.

10 In addition, the false or fraudulent representation or
11 failure to disclose must relate to a material fact or matter.
12 A "material fact" is one which would reasonably be expected to
13 be of concern to a reasonable and prudent person in relying on
14 the representation or statement in making a decision.

15 That means that if you find a particular statement or
16 representation to be false, you must determine whether that
17 statement or representation was one that a reasonable person
18 might have considered important in making his or her decision.
19 The same principle applies to fraudulent half-truths or
20 omissions, that is, failure to disclose facts.

21 The scheme to defraud need not be shown by direct
22 evidence but may be established by all the circumstances and
23 facts of the case.

24 So that's the first element, the existence of the
25 scheme. The second element of mail fraud is knowing

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Charge

1 participation with intent to defraud. That element is that the
2 government has to establish beyond a reasonable doubt that the
3 defendant you're considering devised or participated in the
4 fraudulent scheme knowingly and with the specific intent to
5 defraud. You're familiar with the words "devised" and
6 "participated." To "devise" a scheme to defraud is to concoct
7 or plan it. To "participate" in a scheme to defraud means to
8 associate one's self with it with a view and intent toward
9 making it succeed. That's logical, ladies and gentlemen.
10 While a mere onlooker is not a participant in the scheme of
11 fraud, it's not necessary that a participant be someone who
12 personally and visibly executes the scheme to defraud.

13 The government must prove that the defendant knowingly
14 participated in the charged scheme with the intent to defraud.
15 To act "knowingly" means to act voluntarily and deliberately
16 rather than mistakenly or inadvertently.

17 In order to satisfy this element, it is not necessary
18 for the government to establish that the defendants originated
19 the scheme to defraud. It is sufficient if you find that a
20 scheme to defraud existed, even if originated by someone else,
21 and that the defendants, while aware of the scheme's existence,
22 knowingly participated in it.

23 It's also not required that the defendants
24 participated in or have knowledge of all the operations of the
25 scheme. The guilt of a defendant is not governed by the extent

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Charge

1 of his participation.

2 It also is not necessary that the defendants
3 participated in the alleged scheme from the beginning. A
4 person who comes in at a later point with knowledge of the
5 scheme's general operation, although not necessarily all of its
6 details, and intentionally acts in a way to further the
7 unlawful goals, becomes a member of the scheme and is legally
8 responsible for all that may have been done in the past before
9 that person became a member of the scheme in furtherance of the
10 criminal objective and all that is done thereafter.

11 Even if someone participated in the scheme to a lesser
12 degree than others, he is nonetheless equally guilty so long as
13 he became a member of the scheme to defraud at some point in
14 its existence with knowledge of its general scope and purpose.

15 The question of whether a person acted knowingly and
16 with intent to defraud is a question of fact for you to
17 determine like any other fact question. This question involves
18 one's state of mind.

19 Direct proof of knowledge and fraudulent intent is
20 almost never available. It would be a rare case where it could
21 be shown that a person wrote or stated that as of a given time
22 in the past he committed an act with fraudulent intent. Such
23 direct proof is not required, and seldom exists, obviously.

24 The ultimate facts of knowledge and criminal intent
25 are subjective and may be established by circumstantial

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Charge

1 evidence based on someone's outward manifestations, words,
2 conduct, acts, and all the surrounding circumstances disclosed
3 by the evidence and the rational or logical inferences that may
4 be drawn therefrom.

5 As you know, circumstantial evidence, if you believe
6 it, is of no less value than direct evidence. In each case,
7 the essential elements of the crime have to be established
8 beyond a reasonable doubt.

9 You see some themes in these instructions, ladies and
10 gentlemen.

11 As a practical matter, in order to sustain the charge
12 against the defendant you are considering, the government must
13 establish beyond a reasonable doubt that that defendant knew
14 that his conduct as a participant in the scheme was calculated
15 to defraud, and nonetheless he associated himself with the
16 alleged fraudulent scheme for the purpose of causing some loss
17 to another.

18 First element of mail fraud, the existence of the
19 scheme; the second element, participation; third element is the
20 use of mails in furtherance of the scheme. Use of mail could
21 be from one state to another or within a state or even within a
22 single city, it doesn't matter, as long as the United States
23 mails were used. The mail matter does not have to contain
24 fraudulent representation or requests for money, but it must
25 further or assist in carrying out the scheme to defraud.

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1 It's not necessary for the perpetrator to be directly
2 or personally involved in the mailing, as long as the mailing
3 was reasonably foreseeable in the execution of the scheme to
4 defraud.

5 Here, the government alleges that the mails or
6 commercial carriers were used in furtherance of the fraud in a
7 number of ways, including by mailing or causing to be mailed
8 documents, legal correspondence, court filings between the
9 attorneys representing the patients who participated in the
10 staged accidents and the businesses or attorneys representing
11 the businesses or insurance companies named in the fraudulent
12 lawsuits, as well as by mailing or causing to be mailed money
13 to patients' attorneys and others involved in the fraud scheme.

14 That's mail fraud. Now we'll go to wire fraud, which
15 is Counts Three and Six.

16 Count Three charges the three defendants here with
17 wire fraud from at least the January 2013 up to April 2018.

18 Count Six charges Mr. Duncan with a separate count of
19 wire fraud from 2015 to 2018.

20 The wire fraud statute provides:

21 Whoever, having devised or intending to devise any
22 scheme or artifice to defraud, or for obtaining money or
23 property by means of false or fraudulent pretenses,
24 representations or promises, transmits or causes to be
25 transmitted by means of wire, radio or television communication

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Charge

1 in interstate or foreign commerce, any writings, signs,
2 signals, pictures or sounds for the purpose of executing such
3 scheme or artifice, shall be guilty of a federal crime.

4 The government has to prove three elements beyond a
5 reasonable doubt for these wire fraud counts:

6 First element is the existence of a scheme or artifice
7 to defraud or a scheme or artifice to obtain money or property
8 by means of materially false or fraudulent pretenses,
9 representations or promises; the second is the knowing and
10 willfully devising or participating in the scheme or artifice
11 to defraud by the defendant with knowledge of its fraudulent
12 nature and with the specific intent to defraud, or that
13 defendant knowingly and intentionally aided and abetted others
14 in the scheme; and third, that in the execution of that scheme,
15 the defendant used or caused to be used interstate wires.

16 So the first element is the existence of the scheme,
17 the second element is the participation of the defendant in it,
18 and the third is that the defendant used interstate wires.

19 The first two elements are wire fraud are identical to
20 first two elements of mail fraud, so just use those
21 instructions.

22 Now we'll go to the third element, which is use of
23 interstate wires, which are phone calls or emails, text
24 messages, things of that nature.

25 Wire communication has to be an interstate wire, it

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Charge

1 must pass between two or more states. The use of a wire may
2 not itself be a fraudulent misrepresentation but it must assist
3 in some way in carrying out the scheme to defraud.

4 It's not necessary for the defendants to be directly
5 and personally involved in any wire communication, as long as
6 that communication is reasonably foreseeable in the execution
7 of the scheme to defraud in which the defendants are accused of
8 participating. In this regard, it would be sufficient to
9 establish this element of the crime if the evidence justifies a
10 finding that the defendants caused the wires to be used by
11 others. This does not mean that the defendants themselves must
12 have specifically authorized others to execute a wire
13 communication. When one doesn't act with knowledge that the
14 use of the wires would follow in the ordinary course of
15 business, where such use of the wires can reasonably be
16 foreseen, even though not actually intended, then he causes the
17 wires to be used. This wire communication requirement is
18 satisfied even if the wire communication is done by a person
19 with no knowledge of the fraudulent scheme, including the
20 victim of the alleged fraud.

21 Let me also add the following: Only the wire
22 communication must be reasonably foreseeable, not the
23 interstate or foreign component. Thus, if you find that the
24 wire communication reasonably foreseeable, and the interstate
25 or foreign wire communication actually took place, then that

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Charge

1 element is satisfied even if it was not foreseeable that the
2 wire communication would cross state or national lines.

3 Now in addition to charging the defendants with the
4 substantive counts of mail and wire fraud, all of the
5 substantive counts I'm talking about, they also charge the
6 defendants with what is called aiding and abetting.

7 Aiding and abetting is one manner of committing a
8 crime. A defendant can be convicted of committing a crime if
9 the defendant helps someone else to commit the crime. That's
10 logical, ladies and gentlemen. For example, if the government
11 proves beyond a reasonable doubt that the defendant you are
12 considering committed the mail fraud alleged in, for example,
13 Count Two, then you need not consider aiding and abetting with
14 respect to that count and that defendant. But if you find that
15 the government did not prove beyond a reasonable doubt that
16 that defendant engaged in mail fraud, for example, you should
17 consider whether the government has nonetheless proved beyond a
18 reasonable doubt that the defendant aided and abetted someone
19 else in committing mail fraud.

20 The concept of aiding and abetting is alleged in all
21 the substantive counts, I'm just using mail fraud as an
22 example, that is, Counts Two, Three, Five and Six, those are
23 the substantive counts, One and Four are the conspiracy counts.
24 And again, you will see this in the verdict sheet. It will
25 help you.

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Charge

1 Under the federal aiding and abetting statute,
2 whatever "aids, abets, counsels, commands, induces or procures"
3 the commission of an offense is punishable as a principal. A
4 person who aid and abets another to commit a substantive crime
5 is just as guilty of that crime as if he had personally
6 committed it. You may thus find a defendant guilty if you find
7 beyond a reasonable doubt that the government has proven that
8 someone committed the substantive offense and that the
9 defendant you are considering helped or assisted that person in
10 the commission of the offense.

11 The first requirement of aiding and abetting is that
12 someone else has committed the crime. The defendant you are
13 considering cannot be convicted of aiding and abetting if
14 nobody committed the underlying crime. That makes sense, too,
15 right? It does. But if you do find that the underlying crime
16 was committed by someone other than the defendant you are
17 looking at, consider whether that defendant aided or abetted
18 the person who actually committed the crime.

19 To aid and abet another to commit a crime, the
20 defendant you are considering must have willfully and knowingly
21 associated himself in some way with the crime, and he must have
22 willfully and knowingly sought by some act to help make the
23 crime succeed. Participation in a crime is willful if action
24 is taken voluntarily and intentionally. Mere presence of a
25 defendant that you are considering in a place where a crime is

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1 being committed, even coupled with knowledge that a crime is
2 being committed, is not enough to make him an aider or abettor.
3 A defendant's acquiescence in the criminal conduct of others,
4 even with guilty knowledge, is not enough to establish aiding
5 and abetting. An aider and abettor must have his on
6 affirmative interest in the criminal venture.

7 To determine whether the defendant you are considering
8 aided and abetted the commission of the crime, ask these
9 questions:

10 Did someone other than the defendant you are
11 considering commit the crime at issue? If no, go on to the
12 next count.

13 Did the defendant you are considering participate in
14 the crime charged as something that he wished to bring about?

15 Did he associate himself with an attempt to commit the
16 crime with other people knowingly and willfully?

17 Did he seek by his actions to make the criminal
18 venture succeed?

19 If so, then the defendant you are considering is an
20 aider and abettor and therefore guilty of the offense under the
21 consideration. If not, he's not an aider and abettor and not
22 guilty of the offense under consideration.

23 Now let's go to Counts One and four, which are
24 conspiracy to commit mail and wire fraud. Because I talked
25 about the substantive counts, now I'm going to talk about the

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Charge

1 conspiracy counts.

2 I have told you that a conspiracy to commit a crime is
3 an entirely separate and different offense from the substantive
4 crime which is the object of the conspiracy.

5 Count One charges that Duncan, Locust and Rainford
6 committed conspiracy to commit mail and wire fraud from
7 January 2013 to April 2018. Count Four charges Duncan alone
8 with conspiracy to commit mail and wire fraud from 2015 to
9 April 2018.

10 As you know, the government alleges that in 2015
11 Duncan withdrew from the conspiracy that involved Rainford and
12 Locust and entered into a separate fraud conspiracy which
13 operated essentially the same way as the first charged
14 conspiracy.

15 The conspiracy statute provides that any person who
16 conspires to commit any offense under this chapter, including
17 wire fraud, shall be guilty of a crime.

18 In order to sustain its burden of proof on each
19 charge, the government must prove beyond a reasonable doubt the
20 following two elements:

21 One, that the conspiracy that is charged actually
22 existed -- that makes sense, ladies and gentlemen -- and two,
23 the defendant that you are considering intentionally joined and
24 participated in the conspiracy during the applicable time
25 period.

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Charge

1 The first element is the existence of the conspiracy.
2 Conspiracy is an agreement or an understanding by two or more
3 persons to accomplish one or more unlawful objectives by
4 working together.

5 In order for the government to satisfy this element,
6 you need not find that the alleged members of the conspiracy
7 met together and entered into any express or formal agreement.
8 You don't have to find that the alleged conspirators stated in
9 words or writing what the scheme was, its object or its
10 purpose, or every precise detail of the scheme, or the means by
11 which its object or purpose was to be accomplished. What the
12 government must prove is that there was a mutual understanding,
13 either spoken or unspoken, between two or more people to
14 cooperate with each other to accomplish the unlawful objectives
15 alleged, which, for the purpose of this count, is mail and wire
16 fraud.

17 You may, of course, find that the existence of an
18 agreement to commit mail and wire fraud has been established by
19 direct proof. However, since conspiracy is by its very nature
20 characterized by secrecy, you may also infer its existence from
21 the circumstances of this case and the conduct of the parties
22 involved.

23 In a very real sense then, in the context of a
24 conspiracy charge, actions often speak louder than words. In
25 this regard, you may, in determining whether an agreement

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1 existed here, consider the actions and statements of all of
2 those whom you found to or find to be participants as proof
3 that a common design existed on the part of the persons
4 involved in the conspiracy to act together to accomplish an
5 unlawful purpose.

6 You will recall that I have admitted into evidence
7 against the defendants the acts and statements of others,
8 because these acts and statements were committed by persons who
9 the government charges were co-conspirators of the defendants
10 at trial.

11 The reason for allowing this evidence to be received
12 against these defendants has to do with the nature of the crime
13 of conspiracy. A conspiracy is often referred to as
14 partnership in crime. As with other partnerships, when someone
15 enters into a conspiracy to accomplish an unlawful end, every
16 member of the conspiracy becomes an agent for all the other
17 co-conspirators in carrying out the conspiracy because they're
18 working together.

19 Accordingly, the reasonably foreseeable acts,
20 declaration, statements, and omissions of any member of the
21 conspiracy, and in furtherance of the common purpose of the
22 conspiracy, are deemed under the law to be the acts of all
23 members, and all of the members are responsible for such acts,
24 declarations, statements, and omissions.

25 If you find beyond a reasonable doubt that the

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1 defendant you are considering was a member of the conspiracy
2 charged in the indictment, then any acts done or statements
3 made in furtherance of the conspiracy by persons also found by
4 you to have been members of that conspiracy may be considered
5 against that defendant. This is so even if such acts were done
6 and statements were made in that defendant's absence and
7 without his knowledge.

8 That's the first element, there's always the existence
9 of the conspiracy. The second element is always membership in
10 the conspiracy.

11 If you find that the government has proven beyond a
12 reasonable doubt that the charged conspiracy existed, then go
13 to the second element, whether the defendant knowingly and
14 voluntarily became a member of the alleged conspiracy.

15 Apply the definition of "knowingly" that I have given
16 you already.

17 In deciding whether the defendant you are considering
18 was actually a member of the conspiracy, consider whether the
19 defendant knowingly joined the conspiracy. Did he participate
20 in it with knowledge of its unlawful purpose and with the
21 intention of furthering its objective?

22 Note that each defendant's participation in a
23 conspiracy must be established by independent evidence of that
24 defendant's own acts or statements, as well as those of the
25 other alleged co-conspirators, and the inferences that you draw

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1 from them.

2 A defendant's knowledge is a matter of inference from
3 the facts proved. In that connection, I instruct you that to
4 become a member of the conspiracy, the defendant you are
5 considering need not have known the identities of each and
6 every other member, nor need he have been apprised of all of
7 their activities. Moreover, the defendants you are considering
8 need not have been fully informed as to all of the details or
9 the scope of the conspiracy in order to justify an inference of
10 knowledge on his part.

11 Furthermore, the defendant you are considering need
12 not have joined in all the conspiracy's unlawful objectives.

13 The extent of a defendant's participation has no
14 bearing on the issue of the defendant's guilt. A conspirator's
15 liability is not measured by the extent or duration of that
16 defendant's participation. Indeed, each member may perform
17 separate and distinct acts and may perform them at different
18 times. Some conspirators may play major roles, others may play
19 minor roles. An equal role is not required. Even a single act
20 could be enough to draw a defendant within the ambit of a
21 conspiracy.

22 But remember, someone's mere presence at the scene of
23 a crime does not make him a member of the conspiracy. Mere
24 association with one or more members of the conspiracy does not
25 automatically make that person a member. Someone can know a

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1 criminal without being a criminal himself. Mere similarity of
2 conduct or the fact that they may have assembled together and
3 discussed common aims and interests does not necessarily
4 establish membership in the conspiracy.

5 I also want to caution you that mere knowledge or
6 acquiescence without participation in the unlawful plan is not
7 sufficient. Remember, you have to have participated in the
8 unlawful plan. The fact that the acts of a defendant, without
9 knowledge, merely happen to further the purposes or objectives
10 of the conspiracy does not make the defendant a member. More
11 is required. What is necessary is that defendant must have
12 participated with knowledge of at least some of the purposes or
13 objectives of the conspiracy and with the intention of aiding
14 the accomplishment of those unlawful ends. The government is
15 not required to prove that the members of the alleged
16 conspiracy were successful in achieving any or all of the
17 objects of the conspiracy.

18 Once a conspiracy is formed, it is presumed to
19 continue until either its objective is accomplished or there's
20 some affirmative act of termination by its members. So too,
21 once a person is found to be a member of a conspiracy, he is
22 presumed to continue as a member in the conspiracy until the
23 conspiracy is terminated, unless it is shown by some
24 affirmative proof that the person withdrew and disassociated
25 himself from it.

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1 If you find a conspiracy existed and that a defendant
2 was a member, you may take into account against the defendant
3 any acts or statements made during and in furtherance of the
4 conspiracy by any of his co-conspirators, even though such acts
5 or statements were not made in the presence of the defendant or
6 even if they were made without his knowledge.

7 In sum, in order to find a defendant guilty of
8 conspiracy, you must find that the defendant, with an
9 understanding of the unlawful nature of the conspiracy,
10 intentionally engaged, advised or assisted in it for the
11 purpose of furthering the illegal undertaking. He thereby
12 becomes a knowing and willing participant in the unlawful
13 agreement, that is, a conspirator.

14 Let's look at the objects of the conspiracy. The
15 objects are the illegal goals the conspirators agreed on or
16 hoped to achieve. In Counts One and Four the indictment
17 charges the objects of the conspiracy were mail fraud and wire
18 fraud. The government has to prove beyond a reasonable doubt
19 that at least one of the objects of the charged conspiracy was
20 mail fraud or wire fraud. There must be unanimous agreement on
21 at least one object in order for you to find that the
22 conspiracy existed, but you need not find that each defendant
23 conspired with others to achieve the same object. If the
24 government fails to prove that at least one of the two objects
25 was the goal of any conspiracy that you find existed, then you

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1 must find the defendants not guilty on the count alleging that
2 conspiracy.

3 I already instructed you on the elements of mail fraud
4 and wire fraud when I was going through the substantive counts.
5 Follow those instructions here.

6 Bear in mind that the actual commission of an
7 objective of the conspiracy is not an element of the crime of
8 conspiracy. You need not find that the conspirators actually
9 committed mail fraud or wire fraud, but only that they agreed
10 to commit mail fraud or wire fraud.

11 As I explained, all of the counts charged require the
12 government to prove that each defendant acted knowingly. In
13 determining whether that is true, you may consider whether the
14 defendant deliberately closed his eyes to what otherwise would
15 have been obvious. This is called "conscious avoidance."

16 I wish to point out that the necessary knowledge on
17 the part of any defendant with respect to any particular charge
18 cannot be established by showing that that defendant was
19 careless, negligent or foolish. However, one may not willfully
20 and intentionally remain ignorant of a fact material and
21 important to his conduct in order to escape the consequences of
22 criminal law. The law calls this "conscious avoidance" or
23 "willful blindness." The government can prove either that the
24 defendant actually knew the objective of the conspiracy or he
25 consciously avoided knowing the object of the conspiracy.

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1 Thus, if you find beyond a reasonable doubt that the
2 defendant you are considering was aware that there was a high
3 probability a crime was being committed but he deliberately and
4 consciously avoided confirming that fact, such as by closing
5 his eyes to it or intentionally failing to investigate it,
6 then you may treat this deliberate avoidance of positive
7 knowledge as the equivalent of knowledge, unless you find that
8 the defendant you are considering actually believed that he was
9 not engaged in unlawful behavior. The defendant cannot avoid
10 criminal responsibility by deliberately closing his eyes or
11 remaining purposefully ignorant of the facts that would confirm
12 to him that he was in fact engaging in unlawful conduct.

13 Keep in mind that there's an important difference
14 between knowingly and intentionally participating in a
15 conspiracy and knowing the specific objective of the
16 conspiracy. You may consider conscious avoidance in deciding
17 whether someone knew the objectives of the conspiracy, that is,
18 whether he reasonably believed there was a high probability
19 that a goal of the conspiracy was to commit the crime charged
20 as objects of the conspiracy and took deliberate and conscious
21 action to avoid confirming that fact and participated in the
22 conspiracy anyway. Conscious avoidance cannot be used as a
23 substitute for finding that that defendant knowingly and
24 intentionally joined the conspiracy in the first place. It is
25 logically impossible for a defendant to intend and agree to

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1 join a conspiracy if he doesn't know it exists. That makes
2 sense. However, if you find beyond a reasonable doubt that the
3 defendant knowingly chose to participate in such a joint
4 undertaking, you may consider whether he took deliberate and
5 conscious action to avoid confirming otherwise obvious facts
6 about the purpose of the undertaking.

7 In sum, if you find that a defendant believed there
8 was a high probability that a fact was so and that the
9 defendant took deliberate and conscious action to avoid
10 learning the truth of that fact, you may find that the
11 defendant acted knowingly with respect to that fact. But if
12 you find that the defendant actually believed the fact was not
13 the so, then you may not find that he acted knowingly with
14 respect to that fact.

15 I again wish to instruct you that the patients on the
16 intake sheets referred by individuals other than Bryan Duncan
17 or Kerry Gordon, those intake sheets can only be considered by
18 you as evidence of the charges in Counts One, Two and Three.

19 Now in addition to the foregoing elements of the
20 offenses, you must consider whether the crimes charged or any
21 acts in furtherance of them occurred within the Southern
22 District of New York, and the Southern District of includes
23 Manhattan, the Bronx, Westchester, Rockland, Putnam, Sullivan,
24 Orange and Dutchess County.

25 (Continued on next page)

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1 THE COURT: On the issue of venue, and venue alone,
2 the government's burden is not to prove venue beyond a
3 reasonable doubt. The government's burden is simply to prove
4 venue by a preponderance of the evidence -- that is, it simply
5 has to prove it's more likely than not that an act in
6 furtherance of the charges you're considering occurred in the
7 Southern District of New York. With respect to each of the
8 counts, the government has satisfied its venue obligations if
9 you conclude that it's more likely than not that the crime
10 charged for any act in furtherance of it occurred within the
11 Southern District of New York.

12 The defendant you're considering need not be the
13 individual who committed or caused the act in furtherance of
14 the conspiracy. And the act may have been committed by a
15 co-conspirator even if the co-conspirator is not a defendant
16 here.

17 If you find that the government has failed to prove
18 venue requirement by a preponderance of the evidence, you must
19 acquit the defendants of the charges.

20 The indictment alleges that certain acts occurred on
21 or about a specific date. It does not matter if the evidence
22 you heard at trial indicates that a particular act occurred on
23 a different date. The law requires only a substantial
24 similarity between the dates and amounts alleged in the
25 indictment and dates and amounts established by the evidence.

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1 Do one of the parties have the indictment? Does
2 somebody have the indictment?

3 MS. ROTHMAN: We can provide it to your Honor right
4 after you finish your charge.

5 THE COURT: You'll what?

6 MS. ROTHMAN: We'll provide it to your Honor.

7 THE COURT: Provide it. Okay.

8 So I'm going to send you in with the verdict form and
9 these charges, and if you want copies of the charge for
10 everyone, let me know.

11 You know you have to decide the facts here. You have
12 to decide whether each defendant is guilty or not guilty solely
13 on the basis of evidence or lack of any evidence, and these
14 instructions.

15 You can't be influenced by sympathy or any assumption
16 stemming from personal feelings, the nature of the charges, or
17 your views on the relative seriousness or lack of seriousness
18 of the charged crimes.

19 You must not consider any punishment that may be
20 imposed upon any defendant who may be convicted. The duty of
21 imposing sentence in the event of conviction rests exclusively
22 on me. You must weigh the evidence and determine the guilt or
23 nonguilt of each defendant solely on the evidence and the law
24 that I'm giving you.

25 Each juror is entitled to his or her opinion, but you

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1 are required to exchange views with your fellow jurors. This
2 is the very essence of jury deliberations. It's your duty to
3 discuss the evidence. If you have a point of view and after
4 reasoning with other jurors it appears that your own judgment
5 is open to question, then of course you should not hesitate in
6 yielding your original point of view if you are convinced that
7 the opposite point of view is really one that satisfies your
8 judgment and conscience. However, don't give up a point of
9 view that you conscientiously believe in simply because you are
10 outnumbered or outweighed. You should vote with the others
11 only if you are convinced on the evidence and the facts and the
12 law that that is the correct way to decide the case.

13 You know we've made a record of these proceedings. If
14 you want to have any of the testimony read back, we'll find the
15 testimony and bring you in. Just remember, be as specific as
16 you can, because we're going to have to locate that testimony.
17 And remember also it may take some time. Also remember, if
18 you're asking for a day's worth of testimony, it will take a
19 day to read it back, or something shy of a day. But
20 nonetheless, we can make available any testimony that you're
21 seeking. And also, any exhibits. If you want an exhibit sent
22 back, let me know. The foreperson will send me a note and say,
23 Judge, the jury requests Exhibit No. whatever it is, or you
24 describe it, and again, the more specific you can be, the less
25 time it will take to get that back to you. The exhibits will

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1 go back into the jury room, exhibits that you want. For
2 testimony, we have to bring you here into open court and read
3 it in open court. So be patient if you do ask for specific
4 testimony.

5 I'm going to ask you, any note should be signed by the
6 foreperson with a question and date it and time it.

7 I'm going to ask that the jurors choose its own
8 foreperson. If the jury can't choose a foreperson, let me know
9 and I'll choose a foreperson. But normally jurors are very
10 successful in choosing a foreperson.

11 In the note, don't give me any indication of your
12 thinking on any disputed issue, or any tentative votes you may
13 have taken. Just ask questions or ask for exhibits or
14 readbacks.

15 When you do have a verdict, don't tell me what that
16 verdict is. The foreperson should just send out a note saying:
17 Your Honor, we've reached a verdict. And then we'll bring you
18 in here and in a formal proceeding, we'll take that verdict.
19 So the foreperson should have the verdict form, obviously. And
20 you'll go through the verdict form and the jury will decide
21 unanimously what the answers are, and then you'll all sign it.
22 And then the foreperson, as I say, will send me a note saying:
23 We have a verdict. And then when I bring you out here, the
24 foreperson will have the verdict form with him and will read it
25 in open court.

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1 The verdict must be by unanimous vote of all of you.

2 All right. Any additional objections or additional
3 charges for the parties?

4 MR. DINNERSTEIN: Could we have a sidebar, your Honor.

5 THE COURT: All right. Then, ladies and gentlemen,
6 I'm going to give you a verdict form and I'll give you the
7 charge, I'm going to give you paper and pencil --

8 MR. FOLLY: Your Honor, I believe Mr. Dinnerstein
9 wants a sidebar.

10 MR. DINNERSTEIN: Sidebar?

11 THE COURT: Pardon me? Yes.

12 Let me ask the Marshal to come forward.

13 (At the sidebar)

14 MR. DINNERSTEIN: Your Honor, based on the argument
15 that the government made this morning, I think they kind of, I
16 felt, merged the idea of participation, which you mentioned on
17 several occasions, but participation must be merged with intent
18 to defraud, and I believe first that the government in their
19 arguments tried to say participation was sufficient, and I
20 felt, your Honor, that it would be appropriate for you to speak
21 to the jurors and talk about how participation is not enough.
22 What I said was something like this: Mere participation is not
23 sufficient. The government must also prove beyond a reasonable
24 doubt --

25 THE COURT: Well, I have that in the charge, that we

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1 talk about participation not being enough. I've given a
2 charge. Intent. It's intent.

3 MR. DINNERSTEIN: The defendant you are considering
4 has a specific intent to defraud.

5 THE COURT: That's in the charge.

6 MR. DINNERSTEIN: Is it? That's my objection.

7 The other objection --

8 THE COURT: Overruled.

9 MR. DINNERSTEIN: -- deals with the conscious
10 avoidance charge.

11 THE COURT: I have your objection.

12 MR. DINNERSTEIN: Okay.

13 THE COURT: I think there's basis in the case law and
14 in the record for a conscious avoidance charge.

15 Yes, ma'am.

16 MS. AL-SHABAZZ: I just want to make a record that the
17 government, in both its opening and its closing -- and I would
18 ask the Court to give a curative instruction with respect to
19 the government's vouching for its witnesses, and on closing,
20 Mr. Folly said one of the witnesses had an incredible memory
21 and said one of the witnesses had no reason to lie. That's
22 impermissible.

23 THE COURT: But I think I addressed that. Didn't you
24 object to that and I addressed that?

25 MR. DINNERSTEIN: I did object.

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1 MS. AL-SHABAZZ: Okay.

2 THE COURT: All right. Mr. Folly, what's your
3 response?

4 MR. FOLLY: Your Honor, my response is that that's
5 entirely appropriate argument that I made to the jury and that
6 if we're going to go down this road, we would be here for a
7 long time based on the arguments that were made yesterday.

8 THE COURT: You have your objection. I'm not going to
9 give anything particular at this point.

10 MS. ROTHMAN: Your Honor, we're printing the trial
11 indictment. Just to note, we had sent them to defense counsel
12 I think two days ago and had not heard back of any proposed
13 changes, but I would ask that defense, if they --

14 THE COURT: Do you have copies to give to the defense
15 counsel?

16 MS. ROTHMAN: We've already done that, your Honor, but
17 we're having hard copies printed out and we'll get them from
18 our paralegal.

19 THE COURT: I'll tell them I'm not going to be
20 available from about 2:15 to 3:15, just to let them know that,
21 okay?

22 MR. DINNERSTEIN: Okay. Their lunch is here?

23 THE COURT: Yes. Okay. Thank you.

24 MR. DINNERSTEIN: What about us, Judge? When can we
25 go for lunch?

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1 THE COURT: I need everyone to stay pretty close.
2 Make sure my deputy knows where you are, either on this floor
3 or the government has some offices somewhere, or the cafeteria.
4 Just make sure my --

5 MR. DINNERSTEIN: We won't leave the building.

6 THE COURT: Make sure my deputy can reach you.

7 MS. ROTHMAN: All right. Thank you, your Honor.

8 (In open court)

9 THE COURT: Please administer the oath to the Marshal.

10 (Marshal sworn)

11 THE COURT: All right. Ladies and gentlemen, you can
12 send notes out at any time. I'm not going to be available to
13 this jury from approximately 2:15 to approximately 3:15 or
14 3:30, just so you know. You can send notes out, my deputy will
15 take them, but I can't respond during that period of time.

16 All right. I'm going to ask the jurors in the first
17 row and the second row to stand. And you may begin your
18 deliberations. I'm going to ask the jurors in the third row to
19 remain.

20 (At 1:14 p.m., the jury retired to deliberate)

21 THE COURT: Be seated in the courtroom.

22 Jurors 13, 14, 15, and 16, I'm not going to dismiss
23 you at this time. We can only deliberate with 12 people, but
24 I'm not going to dismiss you at this time, for the following
25 reason: If for any reason one of those 12 cannot continue and

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1 they haven't reached a verdict, there is authority under the
2 law for me to seat one of you in their place. The law has said
3 that the jurors have to commence their deliberations over
4 again. I can tell you a couple of things. But if I've
5 discharged you, I can't bring you back, so I'm not going to
6 discharge you. But I also can tell you, in 24 years of being a
7 judge, that has never happened to me. But nonetheless, I'm not
8 going to formally discharge you.

9 I thought you had to go to the jury clerk. My deputy
10 informs me that you can go straight home. My deputy knows how
11 to reach you. If we need to reach you, we will. You don't
12 have to come back here again. So almost certainly your service
13 is over, but maybe not.

14 And you have the appreciation of everybody, really,
15 because it's quite frequent that we take people from the back
16 row. It didn't happen this time, but I was concerned very much
17 about Memorial Day and whether we would start to lose people
18 because of vacations and so forth. So everyone appreciates
19 your being here.

20 If you would tell my deputy what you ordered for
21 lunch, she'll go in, because the lunches are here, correct?

22 Okay. You can get your lunches and take them home.
23 Thank you very much. You may now get your lunches and go home,
24 and we thank you.

25 (Alternate jurors excused)

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1 THE COURT: All right. Stay close. Do you have that
2 trial subpoena?

3 MS. ROTHMAN: The trial indictment? Our paralegal is
4 printing it right now.

5 THE COURT: The trial indictment. Give it to
6 Ms. Blakely.

7 MS. ROTHMAN: Will do. Thank you.

8 THE COURT: Oh, wait. Are there no objections from
9 anyone?

10 MR. DINNERSTEIN: We haven't seen it.

11 THE COURT: All right.

12 MR. DINNERSTEIN: But I presume it's the same you gave
13 us before?

14 MS. ROTHMAN: Yes.

15 MR. DINNERSTEIN: No objection from us.

16 THE COURT: All right. Thank you.

17 (Recess pending verdict)
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1 THE COURT: It's 2:15, I believe I told the jury I
2 would be unavailable for about an hour. We have now note
3 number 1, which states who is the foreperson.

4 And we have note 2 that has various requests, witness
5 list, prosecution agreements in evidence, can we have a copy of
6 the prosecution agreement, can we look at Bryan's texts and
7 email that are in evidence in addition to WhatsApp messages,
8 definitions on aiding and abetting regarding wire fraud and
9 mail fraud.

10 I gather that at least the government is gathering the
11 documents they believe is responsive. What's the position of
12 the parties in regard to request for witness list?

13 MR. FOLLY: We have no objection to that.

14 THE COURT: Where is such a list?

15 MS. AL-SHABAZZ: There is no witness list.

16 THE COURT: Ten at a time only.

17 MS. ROTHMAN: We have no objection to providing it.
18 We're typing a list now, which we have show it to defense
19 counsel. If your Honor wants to give it back to the jury,
20 that's fine with the government.

21 MS. AL-SHABAZZ: There is no witness list in evidence
22 and I'm not sure what they want, if they want to know a list of
23 all the witnesses that testified at this trial or something to
24 that effect.

25 THE COURT: What's the other option? I think it's

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1 obvious they want a list of the witnesses who testified at this
2 trial. Separate question as to whether we can manufacture such
3 a thing.

4 MS. AL-SHABAZZ: I don't want the government to give
5 them their witness list which has more witnesses than
6 testified.

7 THE COURT: No, it would only be the witnesses that
8 testified on this trial.

9 MS. AL-SHABAZZ: I'm just making sure.

10 THE COURT: Assuming that, you have no objection?

11 MS. AL-SHABAZZ: Right. If I see it first, I have no
12 objection.

13 THE COURT: Nothing is going back into the jury
14 without all the parties seeing it.

15 The government then will make a list of all the
16 witnesses who testified at this trial and show it to the
17 parties, and if everyone agrees, it can could back in.

18 MS. ROTHMAN: Thank you, your Honor.

19 THE COURT: It seems to me that number three, can we
20 have a copy of the prosecution agreement is the same as number
21 two. The prosecution agreement is in evidence.

22 MS. ROTHMAN: We would agree with that interpretation.

23 THE COURT: And I take it the defense does as well.

24 So the parties should get those together as well, and
25 if there's agreement, they should go back in.

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1 Now what about Bryan's texts and emails that are in
2 evidence? The WhatsApp messages are pretty clear, but what
3 about Bryan's texts and emails that are in evidence?

4 MS. ROTHMAN: Your Honor, we have pulled what we
5 understand to be the universe of Mr. Duncan's text messages
6 pulled from his cell phone. We can share them with defense
7 counsel.

8 THE COURT: That are in evidence.

9 MS. ROTHMAN: Correct, your Honor. And we're working
10 to pull the emails right now.

11 MS. AL-SHABAZZ: Well, all of his text messages and
12 calls are in evidence, so I ask the Court to ask the jury what
13 specifically are they looking for because there's -- it's
14 voluminous, and I don't want the government to pick and choose.

15 THE COURT: No, the government is not going to pick
16 and choose, the government is going to provide Bryan's texts
17 and emails that are in evidence. They're not going to pick and
18 choose among them. So we're going to send that back in.

19 Again, the defense has a right to see them, and if
20 there's an objection I will handle it when I get back.

21 MS. ROTHMAN: With respect to Mr. Duncan's cell phone
22 there are text messages and photographs. We have not included
23 the photographs because we do not believe the jury asked for
24 the photographs. That's the government's position.

25 THE COURT: Fine. All right.

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1 MR. DINNERSTEIN: Your Honor, one thing I would say is
2 there may be a distinction between 2 and 3, and one is
3 non-prosecution and the other is prosecution. I'm wondering if
4 what they mean by that is a cooperation agreement, so I ask
5 your Honor that that also be sent back to the jurors.

6 MS. ROTHMAN: We provided both.

7 MR. DINNERSTEIN: Okay. Because you said they seem
8 like the same, but maybe not.

9 THE COURT: I will hand this back to the parties. To
10 the extent there's an agreement, the documents should all go
11 back in. To extent there isn't, I will handle it when I come
12 back. I encourage agreement. Plus the government will make up
13 that witness list.

14 MR. DINNERSTEIN: Your Honor, you'll be back at 3:15?

15 THE COURT: I certainly will try, it may be 3:30.

16 MS. AL-SHABAZZ: That's fine. I want to know if we
17 have time to eat. I would like to eat. We haven't had a lunch
18 hour.

19 THE COURT: Nor has the Court. Make it 3:45 then.

20 MS. AL-SHABAZZ: One more question, how long are we
21 going today? We have finals tonight.

22 THE COURT: Whenever the jury wants to leave.

23 MS. AL-SHABAZZ: I need to know so I could let the
24 school know. I have finals this evening.

25 THE COURT: When do you have to leave?

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1 MS. AL-SHABAZZ: I need to be there by 6:00.

2 THE COURT: When do you have to leave?

3 MS. AL-SHABAZZ: 5:30.

4 THE COURT: Thank you.

5 MS. AL-SHABAZZ: Thank you.

6 THE COURT: The indictment went back.

7 (Recess taken)

8 THE COURT: I'm told that the parties agreed on all
9 the documents to go back in for Court Exhibit Number 2, which I
10 already read into the record, and the documents have gone back.

11 The last item is definitions on aiding and abetting
12 regarding wire fraud and mail fraud. We have an instruction on
13 aiding and abetting. Does anyone have any idea what they want?

14 MS. ROTHMAN: Your Honor, we propose that you reread
15 that instruction to the jury.

16 THE COURT: I will tell them they have it and give
17 them the number.

18 MS. ROTHMAN: That's fine. I didn't realize you sent
19 back a copy of the jury charge.

20 THE COURT: Yes. You weren't listening to my
21 instructions.

22 MR. DINNERSTEIN: Your Honor, I ask if they mean
23 something other than that, other than the charge that you have
24 already given them.

25 THE COURT: I'm not going to do that in open court, I

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1 will do it in writing, but I will direct them first to the
2 aiding and abetting charge.

3 Now we have another note on a torn piece of paper,
4 it's marked as Court Exhibit 3. Can we have any communications
5 between lawyers, Peter Kalkanis and Ryan (Ace), Robert or
6 Bryan?

7 Do the parties have an issue on this or what's the
8 issue, if any?

9 MR. FOLLY: Your Honor, I think the issue on both 1
10 and 2 --

11 THE COURT: Let me read 2. Are there communications
12 between Fast Trak and Bryan and Peter Kalkanis or doctors of
13 funding companies or or funding companies.

14 MS. AL-SHABAZZ: Or.

15 THE COURT: Doctors or funding companies from 2013 to
16 2014, December.

17 MR. FOLLY: Your Honor, I think the main disagreement
18 is who the jury is asking for as far as who is actually on the
19 email communications, whether it's request for emails that
20 would involve every individual that's mentioned there and a
21 lawyer, for example, or any of those individuals listed there
22 and a lawyer, for example, sticking with the first one.

23 THE COURT: I think that is unclear. Does everyone
24 agree?

25 MS. AL-SHABAZZ: Well, your Honor, it's unclear only

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1 because we have already sent the communications. All of the
2 text and emails of Bryan Duncan have gone back from the first
3 note. So I'm thinking, since they already have his individual
4 emails, they're looking to see if there are joint emails with
5 all of them. So I would propose the Court not answer this
6 question and ask the jury for clarification.

7 THE COURT: I think you're doing the same thing.

8 MR. FOLLY: Yeah, we would request clarification as to
9 who they are requesting is on the emails, any of those
10 individuals listed there, and the lawyer, for example, or the
11 funder or whether they're looking for ones involving all.

12 THE COURT: I understand.

13 This is what we're doing: Jury, in response to your
14 request for definitions on aiding and abetting regarding wire
15 fraud and mail fraud, I direct your attention to charge number
16 32 on pages 50 to 53 of my charge.

17 2. You wrote, "Don't we have any communications
18 between lawyers, Peter Kalkanis and Ryan (Ace), Robert or
19 Bryan?" Are you asking for any communication that has all of
20 those individuals in it or are you instead asking only for
21 communications between lawyers on the one hand and Kalkanis,
22 Ryan, Robert or Bryan on the other?

23 I think that's what this comes down to.

24 MS. ROTHMAN: Could you reread that, your Honor?

25 THE COURT: Are you asking for any communication that

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1 has all of those individuals on it? I think that's one
2 possibility. And I thought the other possibility is they're
3 asking for communications between lawyers on one hand and
4 Kalkanis, Ryan, Robert or Bryan on the other, because those are
5 not lawyers. So that would make sense.

6 MS. ROTHMAN: That's fine from the government, your
7 Honor.

8 MS. AL-SHABAZZ: That's fine as well.

9 THE COURT: Okay. So now let's go to the other one.

10 Are there communication -- is there any issue about
11 this one: Are there communications between Fast Trak and Ryan
12 and Peter Kalkanis or doctors or funding companies from 2013 to
13 2014, December?

14 MS. AL-SHABAZZ: I believe the answer is no.

15 MR. FOLLY: Your Honor, I think it's the same question
16 as to the first one as to whether it's a group, meaning it's
17 Peter Kalkanis and Bryan Duncan and a funder, or if it's Peter
18 Kalkanis and a funder or Bryan Duncan and a funder, or Peter
19 Kalkanis and a lawyer or Bryan Duncan and a lawyer.

20 MS. AL-SHABAZZ: Judge, the reason why I disagree with
21 the government is because they specifically are asking for 13
22 and 14, and they already have all of his text messages and
23 emails from the first note.

24 THE COURT: I'll get them to tell us.

25 MS. AL-SHABAZZ: Okay.

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1 THE COURT: My deputy will read -- we have another
2 note -- will read to you what I just dictated?

3 DEPUTY CLERK: In response to your request,
4 definitions on aiding and abetting regarding wire fraud and
5 mail fraud, I direct your attention to charge 32 on pages 50-53
6 of my charge.

7 2. You wrote, "Can we have any communications between
8 lawyers, Peter Kalkanis and Ryan (Ace), Robert or Ryan," are
9 you asking for any communication that has all of those
10 individuals in it, or are you instead asking only for
11 communications between lawyers on one hand and Kalkanis, Ryan,
12 Robert or Bryan on the other?

13 3. Are there communications between Fast Trak and
14 Ryan and Peter Kalkanis or doctors and funding companies from
15 2013 to 2014 December?

16 My question is the same as above, i.e., you want
17 communications on who on one hand and who on the other?

18 MS. AL-SHABAZZ: Sorry, can you read that last
19 sentence again?

20 THE COURT: My question is the same as above. You
21 want communications between who on one hand and who on the
22 other?

23 MS. AL-SHABAZZ: The "who" part I think is confusing.

24 THE COURT: Between what individuals.

25 MS. AL-SHABAZZ: Yeah, I think.

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1 THE COURT: Make it the same question. Between what
2 individuals?

3 MS. AL-SHABAZZ: Yeah. 2013 and 2014.

4 THE COURT: It's there. My question is the same as
5 above, i.e., you want communications between what individuals?

6 All right. I will sign that. And time it, please,
7 and I will sign it.

8 Here's a new note, note number 4. Can we have
9 information regarding Bryan's slip and fall case? Can we have
10 information regarding Ace's slip and fall?

11 I'm going to sign that and bring it in to the jury.

12 What's the position of the parties? They want
13 information, I don't know what that means, testimony and
14 there's documents.

15 MS. AL-SHABAZZ: With respect to Bryan Duncan, I
16 believe that there is only Government Exhibit 501, which is the
17 intake sheet for Bryan Duncan from 2012. I don't believe there
18 is any other evidence that is responsive.

19 THE COURT: Government, do you agree?

20 MR. FOLLY: Your Honor, I think that's right as to the
21 documentary evidence. Our view is that also testimonial
22 evidence is responsive to that request.

23 THE COURT: What about the second one?

24 MR. FOLLY: I believe that's testimony evidence.

25 MS. AL-SHABAZZ: Can the government offer what witness

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1 they believe testified regarding this? I don't remember there
2 being any information about the slip and fall. Whether or not
3 he was a patient, which is corroborated by the 501, is one
4 thing, but is there any information?

5 THE COURT: No, information -- I don't know whether
6 they want documents or testimony, but we can't define
7 "information" so narrowly. It's either testimony or documents
8 regarding the slip and fall.

9 MS. AL-SHABAZZ: So should we ask them for
10 clarification on this note as well?

11 THE COURT: Why don't we give them the documents and
12 the testimony.

13 MS. AL-SHABAZZ: That's why I asked what testimony is
14 the government referring to?

15 THE COURT: If the government seems to think there's
16 testimony, let them find it.

17 MR. FOLLY: Thank you, your Honor.

18 THE COURT: Was there testimony regarding Ace's slip
19 and fall?

20 MR. FOLLY: Yes, I believe there was testimony I think
21 from -- we're looking, but I believe it was from Peter
22 Kalkanis.

23 THE COURT: Take a look right now. We'll take some
24 time on this.

25 The parties should try to find that, and I'm going to

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1 go down to chambers, and then if there are documents and
2 testimony, I'll bring them out and I will ask them did they
3 want documents and testimony, if so, we'll read it to them.

4 (Recess taken)

5 THE COURT: The jury has returned my note to them.

6 1. Any email or text or photos to or from Robert's
7 submitted as evidence.

8 2. Any email or text or photos to or from (Ace) Ryan
9 submitted as evidence.

10 I take it the parties are gathering that.

11 MS. ROTHMAN: Yes, your Honor.

12 THE COURT: 3. Now up above where I typed to the jury
13 when I said, "Are you asking for any communication that has all
14 of those individuals in it or are you instead asking only for
15 communications between lawyers on one hand and Kalkanis, Ryan,
16 Robert or Bryan on the other," they wrote "Answered below."

17 And number 3 below says, "Any email or text or photos
18 to or from Bryan Duncan and Kalkanis, lawyers, doctors, funders
19 between 2013 and January 2015."

20 Are the parties gathering that?

21 MS. ROTHMAN: We are, your Honor.

22 THE COURT: 4. Intake sheets for (Ace) Ryan and Bryan
23 Duncan.

24 5. In simple terms, does the aiding and abetting
25 clause mean that if we convict one, we must inherently convict

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1 the rest?

2 The answer to that is no. I'm going to write that.
3 Anyone object to that?

4 MR. SCHOLAR: No, your Honor.

5 MR. DINNERSTEIN: Maybe an exclamation point.

6 MR. FOLLY: Your Honor, I think going back to the note
7 before this one, there is disagreement about a few things.

8 And also, your Honor, what is your practice with
9 respect to testimony as far as whether we read it back?

10 THE COURT: Yes, we read it back here.

11 MR. FOLLY: There is some disagreements about what is
12 responsive to that.

13 THE COURT: Well, come on, let's get it together,
14 people. There shouldn't be disagreements. If there are I will
15 handle them. But what does that have do -- that doesn't have
16 to do with whether we read it in open court or send it back.

17 MR. FOLLY: No, I wanted to clarify what your practice
18 was so if we should be pulling copy for the jury.

19 THE COURT: Unless it's voluminous, hours, I do it in
20 open court. That's the preference of the Second Circuit.

21 I'm going write on Exhibit 4 that Number 5: Jury, the
22 answer is no.

23 MS. ROTHMAN: Your Honor, the one proposal with
24 respect to that response is we propose that you instruct the
25 jury that on page 35 of the charge you have told them that they

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1 must consider each count and each defendant separately and you
2 must return a separate verdict of guilty or not guilty for each
3 count and for each defendant. That seems like a more fulsome
4 answer to their question than just the word "No," so we propose
5 that your Honor refer them to that language in the charge.

6 MR. DINNERSTEIN: Your Honor, I oppose that. The
7 question is clear.

8 MS. ROTHMAN: I think "inherently" is a little
9 complicated of a word. I think what they're asking is how
10 should we consider the fact that there are multiple charges and
11 multiple defendants. And your Honor already told them the
12 answer to that in the jury charge, so we see no harm in
13 pointing them to that provision of the charge.

14 MS. AL-SHABAZZ: I would object to that, your Honor.
15 I think the Court's first response to answer that no is
16 adequate to the jury's request, and I think anything more than
17 that would be crossing the line into the purview of the jury.

18 MS. ROTHMAN: I don't think that's right when you're
19 citing back the jury charge they have already received.

20 MS. AL-SHABAZZ: They didn't ask for it. They could
21 have if that's what they wanted.

22 MR. DINNERSTEIN: They asked your Honor -- I won't say
23 anything.

24 THE COURT: That's good.

25 Gather the information, I'm going to write something.

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1 This is the note I'm sending back to the jury: Jury,
2 in response to your question number 5, the answer is no. You
3 must consider each count and each defendant separately and you
4 must return a separate verdict of guilty or not guilty for each
5 count for each defendant. Whether you find the defendant
6 guilty or not guilty as to one offense should not affect your
7 verdict as to any other offense charged.

8 Send this back to the jury.

9 MS. ROTHMAN: No objection, your Honor.

10 THE COURT: Pardon me?

11 MS. ROTHMAN: No objection.

12 THE COURT: Now are we ripe for the issues of what is
13 relevant to the evidence testimony?

14 MS. ROTHMAN: Your Honor, I think we're happy to
15 explain what the disagreement is to your Honor. The jury has
16 asked for information on Mr. Duncan and Mr. Rainford's cases.
17 We have pulled --

18 THE COURT: We're back on the earlier one, Number 4,
19 yes.

20 MS. ROTHMAN: So we pulled Mr. Duncan's intake sheet.
21 There's also testimony from Mr. Kalkanis about that case and
22 specifically about that intake sheet. It was elicited on
23 cross-examination. So we propose reading that testimony back
24 to the jury in conjunction with providing the intake sheet.

25 THE COURT: Well, if there's testimony about his slip

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1 and fall, it's relevant, it should be read back.

2 MS. AL-SHABAZZ: It's not, your Honor, that's the
3 problem. The intake sheet has on it a recitation of the slip
4 and fall incident or whatever, but the emails -- the testimony
5 simply says pull up 501, when did he become a patient, and the
6 date, and that's it. There's nothing about a slip and fall.
7 Nothing.

8 THE COURT: What's the testimony?

9 MS. ROTHMAN: I can read it, your Honor, it begins --
10 it actually occurs twice, the first is on page 993 where
11 Mr. Kalkanis, in sum and substance says that --

12 MS. AL-SHABAZZ: -- please.

13 MS. ROTHMAN: Gladly.

14 THE COURT: You know, there's a little too much
15 personal clashing here. Let's adjudicate the issues without
16 the personal friction between two of the attorneys.

17 What page?

18 MS. ROTHMAN: 993, line 7 to 16 is the first reference
19 to Mr. Duncan's case.

20 THE COURT: What lines?

21 MS. ROTHMAN: Lines 7 to 16.

22 THE COURT: Go ahead.

23 MS. ROTHMAN: Should I read them, your Honor?

24 THE COURT: I have it in front of me. It's easy
25 enough, put it in.

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1 MS. ROTHMAN: Thank you.

2 The second reference to Mr. Duncan's case is on page
3 1225, beginning on line 12.

4 THE COURT: Ms. Al-Shabazz, what's your point?

5 MS. AL-SHABAZZ: My point is those passages are not
6 responsive to the jury's question. The jury is looking for
7 information about a slip and fall. They're not asking about
8 who referred him to Peter Kalkanis, but if they were, that's in
9 there. It's not responsive.

10 THE COURT: Government?

11 MS. ROTHMAN: So your Honor, I'm focusing beginning on
12 line 12 going to the next page, line 16, Ms. Al-Shabazz asks --

13 THE COURT: Any particular page?

14 MS. ROTHMAN: Page 1225 begins on line 12.

15 THE COURT: Yes.

16 MS. ROTHMAN: 2012 is when Bryan Duncan came to you as
17 a patient, right? Yes. There's some additional questions
18 about that and Ms. Al-Shabazz asked to pull up the intake
19 sheet, Government Exhibit 501, and then Ms. Al-Shabazz asks if
20 Mr. Duncan was a patient, that's line 7 of 1226, and then
21 Mr. Kalkanis responds he wasn't a patient, what he was was a
22 finance deal, we financed money for his -- in conjunction with
23 his attorney and a major funder that I used throughout this
24 business.

25 "Q. He had an injury, right?

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1 "A. Sorry?

2 "Q. He had an injury?

3 "A. He claimed he did, yes."

4 I think that's probably responsive to the request for
5 information about Mr. Duncan's case.

6 THE COURT: Ms. Al-Shabazz?

7 MS. AL-SHABAZZ: I'm looking at it now. That's not
8 what the government gave me.

9 MS. ROTHMAN: Finally, your Honor, with respect to
10 Mr. Rainford --

11 THE COURT: Before you go on, I will allow the last
12 section you read because I think that's relevant, that is 501,
13 I have it right here, what's the date, it was a patient, he had
14 an injury, right down what he claims he did, yes.

15 MS. ROTHMAN: Thank you.

16 THE COURT: But not the earlier stuff. What else?

17 MS. ROTHMAN: So we begin on I guess line 23 of page
18 1225.

19 THE COURT: Yes.

20 MS. ROTHMAN: Okay. With respect to Mr. Rainford, he
21 also had a case, there's testimony from Ms. Norwood on page 117
22 of the transcript. This is on consent. Mr. Scholar agrees
23 with the government's proposal.

24 THE COURT: All right. Then I don't have to deal with
25 it.

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1 MS. ROTHMAN: It will be 117, line 12, to 119, line
2 12.

3 THE COURT: All right.

4 MS. ROTHMAN: And then the other disagreement -- the
5 only disagreement with Mr. Scholar relates to whether we should
6 be able to show the jury Government Exhibit 733, this is a
7 conversation between Mr. Duncan and Mr. Gordon in which they
8 discuss that Mr. Rainford, and I will quote, "he probably got
9 his bread," after discussing that he has a new car, and that's
10 in reference to Mr. Rainford's lawsuit. That's the
11 government's position, his settlement.

12 MR. SCHOLAR: Judge, I have four concerns. One, the
13 email or text chain doesn't reference the slip and fall in any
14 way.

15 THE COURT: Let me see it.

16 MR. SCHOLAR: Two, it appears to be a text that
17 involves multiple subjects throughout their back and forth.

18 Three, it mentioned another person, another male
19 person inside that text chain, and then references "he," so
20 there's confusion as to what is being spoken about.

21 And four, it was never explained during the trial. It
22 was never explained during the trial, so the jury has to
23 speculate to reach the conclusion that the government wants.

24 MS. ROTHMAN: I mean, your Honor, this is directly in
25 reference to Mr. Rainford's case and his statement. We argue

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1 that it should be shown to the jury as they requested
2 information on his case.

3 THE COURT: It's out.

4 MR. SCHOLAR: Thank you, Judge.

5 MS. AL-SHABAZZ: Could I get some clarity where we're
6 stopping with the statement that you're letting in that starts
7 at 1225, line 23?

8 THE COURT: Ms. Rothman just put it on the record.

9 MS. AL-SHABAZZ: I don't know.

10 MS. ROTHMAN: 1225, 23 to 1226, 14. That's the
11 government's proposal.

12 THE COURT: Court Exhibit Number 5 from the jury: How
13 much longer will it take to get the evidence? If it's not
14 ready in 15 minutes, our plan is to be back tomorrow at 10. We
15 have file folders that need to be picked up.

16 There you have it.

17 MS. ROTHMAN: I guess they're done with what we gave
18 them.

19 There was also a request for communications by
20 Mr. Rainford, and so we have Government Exhibit 711M and 1054,
21 which are a text message exchange between Mr. Rainford and
22 Mr. Duncan, and then also an email from Mr. Rainford to
23 Mr. Kalkanis. Those would be responsive to the jury's request
24 that we propose sending back, and I believe that's on consent.

25 MR. SCHOLAR: That's fine.

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1 MS. ROTHMAN: And then there's one additional email
2 between Mr. Duncan and Sady Ribeiro, Government Exhibit 1069.
3 That would be responsive to the jury's request for
4 communications in January 2015 between Mr. Duncan and doctors.
5 So we propose sending that back, and we have shown that to
6 Ms. Al-Shabazz.

7 MS. AL-SHABAZZ: Yeah, I have no objection to that. I
8 believe that the only thing from 2013 to January 2015 is the
9 request. I believe that's the only piece of evidence that is
10 responsive to the jury's request.

11 MS. ROTHMAN: I think they may have text messages
12 involving Mr. Duncan and the relevant people already back with
13 them, so I think we want to check and make sure nothing needs
14 to go back again, but I think that's right.

15 THE COURT: If they have it there I'm not sending it
16 back.

17 MS. ROTHMAN: Finally, Mr. Duncan's intake sheet.

18 THE COURT: Everything that is agreed upon and that I
19 ruled upon, give to my deputy and she will bring it back to the
20 jury.

21 MR. DINNERSTEIN: Your Honor, I think there's nothing
22 for Robert Locust in terms of text messages.

23 THE COURT: Then you can't send it back.

24 MR. DINNERSTEIN: Your Honor, just to be clear, it
25 seems to me that they should receive an answer that there's

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1 nothing regarding Robert Locust, which was their first request
2 under note number 5.

3 THE COURT: I have two note number 4s here.

4 MR. DINNERSTEIN: The first one.

5 THE COURT: We're renumbering. Exhibit 4 is asking
6 for information regarding Bryan's slip and fall and regarding
7 Ace's slip and fall, where Exhibit 5 is my note to the jury
8 about aiding and abetting the others and their responses.

9 That's what you are talking about, right?

10 MR. DINNERSTEIN: Yes, your Honor.

11 THE COURT: Photos to or from Robert submitted as
12 evidence.

13 MR. DINNERSTEIN: I'd say that you could affirmatively
14 say there was none.

15 THE COURT: What's the position of the government?

16 MS. ROTHMAN: I don't think I would respond. I think
17 we're just sending back things that are responsive.

18 THE COURT: That's what it seems to me.

19 MS. ROTHMAN: Also I propose, since it's almost
20 5:30 --

21 THE COURT: And Court Exhibit 6 is how much longer
22 will it take.

23 MS. ROTHMAN: What I propose is have the jury come in,
24 we could read the small excerpts that they requested and then
25 send them home for the night and come back at 10 o'clock

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1 tomorrow to resume their deliberations.

2 THE COURT: Any objections to that?

3 MS. AL-SHABAZZ: Yes, because the Court promised me I
4 could leave at 5:30. It's 5:20.

5 THE COURT: I understand. It is 5:20, and this will
6 not take ten minutes.

7 MS. ROTHMAN: It should take three minutes, maybe
8 five.

9 THE COURT: Bring the jury in. As long as people are
10 agreed, we'll get you out of here by 5:30. Matter of fact, if
11 it doesn't take ten minutes, you'll get out sooner.

12 MS. ROTHMAN: Would we be able to get copies of the
13 notes --

14 THE COURT: Yes.

15 MS. ROTHMAN: -- so we could make a copy of it and
16 keep it for our file?

17 THE COURT: I don't see why not. Is there any
18 objection?

19 MR. DINNERSTEIN: Could we also get copies?

20 THE COURT: I'm going to give it the lawyers and the
21 lawyers can do whatever they want, but make sure we get the
22 originals back.

23 My deputy will make the copies.

24 Jury entering.

25 (Jury present)

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1 THE COURT: Ladies and gentlemen, you've kept us very
2 busy. What we're going to do now is read back testimony that
3 you asked for. And we have been sending a lot of documents
4 back, and if nothing was responsive, you didn't get the
5 documents because it wasn't responsive. We're going to collect
6 all that information.

7 And you asked to start at 10:00 a.m. tomorrow. That's
8 fine. All twelve of you have to be here. You will gather just
9 where you did, that is my jury deliberation room. You will
10 come out and I will see all twelve of you here and I will
11 direct you to recommence your deliberations. Don't deliberate
12 until I see all twelve of you here and I tell you to
13 deliberate. And we'll give you all those documents back again.

14 Government, you are going to read the testimony that
15 is agreed upon.

16 MS. ROTHMAN: Sure, your Honor, I'm happy to read it.

17 MS. AL-SHABAZZ: Sorry, Judge, could we have the
18 reporter read it?

19 THE COURT: Does the reporter have what you have
20 agreed upon?

21 MS. ROTHMAN: We could provide it to him, your Honor.

22 THE COURT: Mike, take a look.

23 (Discussion held off the record)

24 THE COURT: Maybe we shouldn't have even started the
25 process.

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1 Ladies and gentlemen, you're dismissed for the
2 evening. We'll see you tomorrow by 10:00 a.m. You can give my
3 deputy the documents that are in there.

4 (Jury not present)

5 THE COURT: Let me see the excerpts physically. Let
6 me see them.

7 That's right, this section I cut out. The section
8 about Kerry Gordon I cut out.

9 MS. ROTHMAN: Your Honor, I may have misunderstood,
10 but there are actually two portions of the transcript that
11 relate to Mr. Duncan's case. This is the first one, which I
12 believe your Honor said would be allowed, and then there's the
13 second portion which provides some background on Mr. Duncan and
14 then talks about his intake sheet. And as I understood your
15 ruling was that with respect to the second portion we were
16 going to start at line 23 and go to line 14 on the next page,
17 but this, the first provision, would be admitted where
18 Mr. Kalkanis says that Mr. Duncan was a patient.

19 MS. AL-SHABAZZ: No, Judge, that wasn't your ruling.
20 In fact, you said you weren't going to allow the first request
21 of the government and only the second request.

22 MS. ROTHMAN: I don't believe that's right, and I
23 think we could pull it back on the transcript.

24 MS. AL-SHABAZZ: Fine.

25 THE COURT: Pull it back, if you can.

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(Record read)

MS. AL-SHABAZZ: Then after that, when we pulled it up, 1225, you changed your mind and you said you would put that part in and then the first part --

THE COURT: Let's pull up 1225 and see.

(Record read)

MS. ROTHMAN: I think the ruling is with respect to second provision. There is two portions. There's the before the line 23 portion and the after line 23, and I understood your Honor's ruling to say with respect to this portion on page 1225 and 1226 we'll start at line 23 and not include the things before it on this page, nothing to do with your earlier ruling about the other excerpt. That's obvious, your Honor.

MS. AL-SHABAZZ: Judge, that doesn't make any sense. We specifically put the lines -- 1225, line 23 to 1226, line 14. I even asked for clarity on where we were going. We knew exactly where we were starting. And so the only reference the Court could have made was to the 993 application.

MS. ROTHMAN: That's simply not true. In the readback, before we got to this provision, I started on line 1225 -- page 1225, line 12, and your Honor asked me to move ahead. We could read back even further.

I think just objectively I would like to zoom out, your Honor. The question is about Mr. Duncan's case. This is about Mr. Duncan's case, as was the earlier transcript. These

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1 are small readbacks. I don't see the prejudice to Mr. Duncan
2 by having this read to the jury. They want to hear about his
3 case, and there's testimony directly on point. There's no
4 reason not to allow it.

5 THE COURT: Let me look at the note.

6 My deputy took it.

7 Zooming out, they did ask for information regarding
8 his case, so I will allow the earlier part. And to make it
9 clear, it's 993, 7 to 16.

10 Good night. I will see everybody at 10:00 a.m.

11 I really want the personal byplay to stop.

12 (Adjourned to May 23, 2019 at 10:00 a.m.)
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